88-844

No._____

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLARD G. CHRISMAN
Appellant

v.

THE TIMES MIRROR COMPANY
Appellee

On Appeal From The Judgment of the Court of Appeal of California Fourth Appellate District Division One

JURISDICTIONAL STATEMENT

Alexandra M. Kwoka
Carlo Coppo
COPPO & COSGROVE
11975 El Camino Real
Suite 303
San Diego, California 92130
(619) 481-2392

Attorneys for
Appellant

QUESTIONS PRESENTED BY THE APPEAL

A.

Did the Supreme Court of California err in upholding the constitutionality of the California retraction statute by affirming the Appellate Court's determination to apply it to bar plaintiff's libel claims because he did not seek a retraction within 20 days after knowledge of the publications, where plaintiff was entitled to the protection afforded by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 501, et seq., and was therefore entitled to have all statutes of limitation tolled during the period of his military service?

B.

Did the Supreme Court of California err in upholding the constitutionality of the California retraction statute, Civil Code section 48a, which limits a plaintiff to special damages, where the accusations made against plaintiff and printed in the

article were not "hot news," where there was clear and convincing evidence of actual malice, that is defendant's reckless disregard for the truth, where defendant did not offer evidence to contest plaintiff's status as a private figure, and where the accusations were libelous on their face?

C.

Where there was clear and convincing evidence that the defendant republished false accusations first made by Navy personnel in its newspapers with actual malice, and plaintiff proved that the defendant's publications injured plaintiff's personal and professional reputation, did the Supreme Court of California err in upholding the Appellate Court order granting defendant's motion for summary judgment on the grounds that as a matter of law the Navy and not defendant caused plaintiff's injury?

D.

Where defendant's newspaper articles

reporting on plaintiff's court martial trial were neither true nor fair because the testimony was incorrectly or falsely summarized and because substantially all exculpatory testimony and evidence was excluded, did the California Supreme Court unconstitutionally extend the scope of the "neutral reportage" privilege, and literary license doctrine, and misapply Civil Code section 47(4) so as to deprive plaintiff of the right to protect his reputation from defamatory statements.

CITATIONS TO OPINIONS

The Opinion of the Supreme Court of the State of California denying Willard G. Chrisman's Petition for Review on July 28, 1988, affirming the Order of the Court of Appeal, fourth Appellate District, Division One, appears in the Appendix. It is not reported.

The Opinions of the Court of Appeal, Fourth Appellate District, Division One Court also appear in the Appendix. Neither has been officially reported.

LIST OF ALL PARTIES

The parties to the proceeding in the Supreme Court of California were as follows:

Appellant: Willard G. Chrisman

Appellee: The Times Mirror Company

(publishers of the L.A. Times)

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTIONAL GROUNDS	1
STATEMENT OF THE CASE	14
A. Procedural History	14
B. Facts	17
REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL	34
A. The Supreme Court of California, by Affirming the Application of the Retraction Statute, California Civil Code 48a, when Plaintiff, Because of his Status as a Member of the Armed Services on Overseas Duty, was Unable to Retain Counsel to Protect his Legal Rights, Deprived Plaintiff of the Protection Mandated by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. 501, et seq.	34
B. The California Retraction Statute, Civil Code § 48a, Because It Does Not Purport to Exclude From Its Protective Mantle a Newspaper that acts with Actual Malice, is Unconstitutional as Violative of the Fourteenth Amendment.	35
C. The Supreme Court of California, Denied Plaintiff Equal Protection and Due Process of Law Because (1) The Statements Published were Libelous Per Se; (2) Plaintiff Was not a Public Figure or Public Official; (3) There was Clear and Convincing Evidence that the L.A. TIMES Acted with Malice; and (4) Its Publications were not "Hot News."	37

D. By Denying Plaintiff a Jury Trial on the Initial Articles Written About Him, The Supreme Court of California Unconstitutionally Expanded the Neutral Reportage Doctrine. 42

E. Where a Comparison Between the Transcript of Judicial Proceedings and a Newspaper's Publications Reveals Editing and Deleting such that the Nature and Contents of the Proceedings are Misrepresented, is it Constitutionally Permissible to Invoke the Literary License Doctrine? 43

CONCLUSION 45

FOOTNOTES 47

TABLE OF AUTHORITIES

Federal

	Page(s)
Allard v. Church of Scientology (1976) 58 Cal.App.3d 439, cert. den. 429 U.S. 1091 (1971)	38
Ciancini v. New Times Publishing Co. 639 F.2d 54 (2d Cir. 1980)	42
Curtis Publishing Co. v. Butts 388 U.S. 130 (1967)	42
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. __ U.S. __, 105 S.Ct. 2939 (1985)	44
Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974)	36, 38, 41, 44
Hutchinson v. Proxmire 443 U.S. 111 (1979)	41
New York Times v. Sullivan 376 U.S. 254 (1964)	36, 41, 44
Philadelphia Newspapers Inc. v. Hepps U.S. 106 S.Ct. 1558 (1986)	41
Schiavone Construction Co. v. Time, Inc. 619 F.Supp. 684 (D.C.N.J. 1985)	43, 44
Time, Inc. v. Firestone 424 U.S. 448 (1976)	38

TABLE OF AUTHORITIES

	Page(s)
Werner v. Southern California Associated Newspapers (1950) 35 Cal.2d 121, app. dism. 340 U.S. 910 (1951)	35

California

Burnett v. National Inquirer 144 Cal.App.3d 991 (1983)	37, 39
Field Research Corp. v. Superior Court 71 Cal.2d 110 (1971)	39
Manguso v. City of Oceanside 153 Cal.App.3d 574 (1984)	41
Williams v. Daily Review, Inc. 236 Cal.App.2d 405 (1965)	37

CODES/STATUTES

Reference	Section	Page No(s).
Civil Code	45	7, 8
	47(4)	Passim
	48a	Passim

MISCELLANEOUS

Reference	Page No(s).
Soldiers' & Sailors' Civil Relief Act	Passim
United States Constitution	4

STATEMENT OF JURISDICTIONAL GROUNDS

1. On May 17, 1985, WILLARD G. CHRISMAN (hereafter "CHRISMAN") filed a libel suit in the Superior Court of the County of San Diego, State of California, against the Times Mirror Company, publishers of the LOS ANGELES TIMES (hereafter "L.A. TIMES"). He claimed that by publishing an article on May 20, 1984 in which the L.A. TIMES republished, without investigation, allegations that while drunk he caused his ship, the USS THOMASTON, to go aground in Hawaii, and by republishing these allegations in an article dated August 29, 1984, and by publishing five articles in October of 1984 during his court-martial trial in which it republished the same false accusations and unfairly described the trial testimony, the L.A. TIMES caused him injury, including personal injury and injury to his reputation and Naval career. (Copies of these articles and an article dated June 22, 1984 are

included in the Appendix.)

On June 26, 1987, the trial court denied the L.A. TIMES' motion for summary judgment. On September 27, 1987, the California Court of Appeal, Fourth District, Division One (hereafteer "Appellate Court") denied the L.A. TIMES' Petition for Writ of Mandate seeking to compel the trial court to grant its motion for summary judgment.

On November 12, 1987, the California Supreme Court granted the L.A. TIMES' Petition for Review and directed the Appellate Court to hear the matter.

In its opinion, filed May 9, 1988, the Appellate Court granted the L.A. TIMES' Petition for a Writ of Mandate; it reversed the order of the San Diego Superior Court denying the L.A. TIMES' Motion for summary judgment. The Appellate Court held that, as a matter of law, the retraction statute, California Civil Code section 48a was applicable, and that it was the Navy that

was the legal cause of plaintiff's special damages; thus, it granted summary judgment as to the May 20, 1984 article. Applying California Civil Code section 47(4), and the literary license doctrine, it concluded that the articles on the court-martial were true and fair as a matter of law and granted summary judgment as to them.

2. On July 28, 1988, the Supreme Court of California denied plaintiff's petition for review of the Appellate Court's May 9, 1988 opinion, thereby upholding the validity of the challenged statutes, Civil Code section 48a, and Civil Code section 47(4), and rejecting plaintiff's claim that the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.A. App. § 501, et seq. applied, and that the retraction statute was unconstitutional, thereby depriving plaintiff of due process and equal protection. A copy of the Order is set forth in the Appendix.

3. Jurisdiction of this Court is con-

ferred by 28 U.S.C. § 1257(2) in that there is drawn into question the validity of a state statute (Civil Code section 48a) on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

4. The provisions of 28 U.S.C. § 2403(b) may be applicable and, accordingly, service of this Jurisdictional Statement has been made upon the Attorney General of the State of California.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

> "Congress shall make no law... abridging the freedom of speech, or of the press. . .."

2. United States Constitution, Amendment XIV, § 1:

> ". . .[N]or shall any state deprive any person of life, lib-

erty, or property, without due process of law. . . ."

3. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 501, et seq.:

"This Act [sections 501 to 591 of this Appendix] may be cited as the Soldiers' and Sailors' Civil Relief Act of 1940.

* * *

§ 510. Purpose; suspension of enforcement of civil liabilities

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of

persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591. . .] remains in force.

* * *

§ 525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or pro-

ceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

3. California Civil Code section 45:

"**Libel, What.** Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

4. California Civil Code section 45a:

"**Libel on its face; other actionable defamatory language**

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special dam-

age as a proximate result thereof. Special damage is defined in Section 48a of this code."

5. California Civil Code section 47(4):

"A privileged publication or broadcast is one made--. . .

4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."

6. California Civil Code section 48a:

"**§ 48a. Libel in newspaper; slander by radio broadcast**

1. **Special damages; notice and demand for correction.** In any action for damages for the publi-

cation of a libel in a newspaper, . . . plaintiff shall recover no more than special damages unless a correction be demanded and be not published. . ., as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication. . ., a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication. . .claimed to be libelous.

2. **General, special and exemplary damages.** If a correction be demanded within said period and be not published. . .in substantially as conspicuous a manner in said newspaper. . .as were the statements

claimed to be libelous, in a regular issue thereof published . . .within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication... with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication. . ..

3. **Correction prior to demand.** A correction published. . .in substantially as conspicuous a manner in said newspaper. . .as the statements claimed in the

complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published. . .within three weeks after a demand therefor.

4. **Definitions.** As used herein, the terms 'general damages,' 'special damages' and 'actual malice,' are defined as follows:

(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;

(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has ex-

pended as a result of the alleged libel, and no other;

(c) 'Exemplary damages' are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication. . .with actual malice;

(d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication. . .at the time it is published. . .shall not constitute actual malice."

STATEMENT OF THE CASE

A. Procedural History

This action for libel under the laws of California was instituted in May, 1985 in the Superior Court of California for the County of San Diego. Plaintiff was a Navy Officer who had commanded the USS THOMASTON before the publication by the L.A. TIMES in May, 1984 of an article alleging that he was drunk and caused his ship to go aground. He alleged that the seven articles published by the L.A. TIMES, including five about his court-martial, were defamatory and that they ruined his Naval career and reputation as well as causing him distress and general damages. (A copy of these articles is a part of the Appendix.)

On July 25, 1986, the L.A. TIMES filed its Motion for Summary Judgment, relying on California Civil Code sections 48(a), the retraction statute, and section 47(4), the "fair reporting" privilege. It designated

as the legal issues to be decided, inter alia:

1) Whether or not because plaintiff had not made a correction demand as to the first three of the seven articles within 20 days of knowledge of said publication, he was limited to "special damages," and that plaintiff could not prove that the L.A. TIMES caused him to suffer "special damages"; and

2) Whether its reports on the court-martial were absolutely privileged pursuant to California Civil Code section 47(4), and the United States and California Constitutions.

CHRISMAN filed his response on October 20, 1986.[1/]

On March 13, 1987, plaintiff filed his Supplemental Opposition to the Motion for Summary Judgment.[2/]

On April 9, the Court heard argument and took the matter under advisement, advising the parties they could file

supplemental material.

On May 26, 1987, CHRISMAN filed a Supplemental Memorandum.[3/]

On June 5, 1987 and June 25, 1987, the Superior Court denied the defendant's Motion for Summary Judgment. (A copy of its orders are contained in the Appendix.)

On July 14, 1987, the L.A. TIMES filed a Petition for Peremptory Writs, which was denied by the Fourth District Court of Appeal on September 22, 1987. (A copy of this order is contained in the Appendix.)

On November 12, 1987, the California Supreme Court granted the L.A. TIMES' Petition for Review and directed the Fourth Distrct Appellate Court to hear the matter. (A copy of the order is contained in the Appendix.)

On May 9, 1988, the Appellate Court granted the L.A. TIMES' Petition for Writ of Mandate.

Plaintiff appealed to the California Supreme Court, asserting that the Fourth

District Court of Appeal was in error; that the invocation of the retraction statute, when plaintiff was clearly entitled to the protection of the Soldiers' and Sailors Relief Act, was unconstitutional; and that the invocation of the fair reporting privilege likewise was in error and unconstitutional. The California Supreme Court denied plaintiff's Petition for Review on July 28, 1988.

B. **Facts**

On May 20, 1984, the L.A. TIMES published the first of eight defamatory articles with the headline "Navy Officers Say Drunk Captain Caused Grounding." Without investigating the veracity of its "not for attribution" sources[4/], in the face of an interview with a civilian who confirmed CHRISMAN was not intoxicated and knowing of his distinguished service record, the L.A. TIMES asserted that CHRISMAN was intoxicated on January 24, 1984 and caused the USS THOMASTON to be grounded; thereafter he

caused the USS THOMASTON to leave Hawaii knowing it was damaged; because of the damage seawater filled the ship causing a landing craft (LCU) to "break loose," causing "flooding and chaos" and further damage; he had "covered-up" the cause of the incidents. At the time the first article was published, CHRISMAN was in command of the USS THOMASTON stationed in Japan; had been recommended for promotion, and ordered to attend the Navy War College.[5/]

After the publication of the initial article, CHRISMAN was relieved from command of the USS THOMASTON on June 11, 1984. His superiors advised him he was removed in response to the article. The Navy investigation was reopened.

On June 22, 1984, the L.A. TIMES wrote and published: "the Navy reopened its investigation after the L.A. TIMES published the officers' allegations in a story on May 20, 1984." It also acknowledged the ad-

verse affect this would have on his career. "If he is exonerated. . .it is unlikely he would return to the Thomaston, which he has commanded since 1982."

On July 2, 1984, the Navy on the basis of sworn testimony of Navy personnel on board the ship on January 24, 1984 found "no probable cause" to believe CHRISMAN committed any alleged offenses, including that he was intoxicated. Nevertheless, on August 23, 1984, court-martial proceedings were ordered. The court-martial trial commenced in October, 1984, in San Diego.[6/]

The L.A. TIMES published five articles reporting on the court-martial trial, reiterating their initial allegations that CHRISMAN was drunk and had participated in a cover-up. The articles were neither "true" nor "fair." Examples of the distortions of the trial testimony are as follows:

In the first article, the L.A TIMES stated:

Prosecutors...began their case...by

presenting seven officers and crew members who testified that CHRISMAN exhibited various signs of intoxication before and after the January 24 grounding. (Emphasis added.)

Seven officers and crew members did not testify that "CHRISMAN exhibited various signs of intoxication before and after the January 24th grounding." Rather, ten witnesses testified on the first day of trial: Lt. Morison, Lt. Gannon, Dr. Straube, Mr. Moats, Lt. Kilgore, Lcdr. McCannel, Fireman Medina, Seaman Meeuwes, Lt. Fuzy, and Lt. Lewis. Two witnesses, Mr. Moats and Dr. Straube, were civilians. Fireman Medina and Seaman Meeuwes did testify that CHRISMAN appeared hung-over or dehydrated the next day, but admitted they did not see him on the previous evening. Lieutenant Morrison stated he did not see CHRISMAN on January 24. Lieutenant Gannon stated CHRISMAN walked differently than normal, but there was no smell of alcohol. Lieutenant Kilgore stated CHRISMAN "came aboard rather slowly, his steps were very

heavy, he seemed to be using the brow for a great deal of support." Lieutenant Commander McCannel stated CHRISMAN "looked a little drawn, a little pale, speech was slow, looked a little unsteady, leaned up against a bulkhead" at the time he came on the ship, but that "CHRISMAN arrived on the bridge five minutes before the ship got under way, was two or three feet away from him, he appeared normal and looked better than earlier in the evening." Lieutenant Fuzy stated he "saw CHRISMAN when he woke up and he looked a little disoriented as he had just got up." Lieutenant Lewis was the last officer to testify, he said he "attempted to wake CHRISMAN by calling his name, that he did not see anything abnormal about CHRISMAN when he left his sea cabin." A civilian, Mr. Moats, testified that "he observed CHRISMAN "drinking a couple of beers during the day" and that "CHRISMAN was "not under the influence of alcohol."

In sum, of the ten persons who

testified for the prosecution, one stated he did not see Cmdr. CHRISMAN on the bridge, two stated he "appeared normal," one said he was "not under the influence," two stated he "appeared hung-over or dehydrated the next day," and none stated he thought, believed, or knew CHRISMAN was "intoxicated" or "exhibited various signs of intoxication" before the incident. These witnesses' testimony fairly and accurately could have been and should have been reported as supporting CHRISMAN's defense of illness and food poisoning.

The October 3, 1984 L.A. TIMES' article also stated:

> . . .despite their efforts to wake him, CHRISMAN usually a light sleeper, failed to stir, officers testified. (Emphasis added)

Only two officers testified on October 2, 1984, about CHRISMAN sleeping before going to the bridge. Lieutenant Lewis stated: he "attempted to wake CHRISMAN by calling his name and that he previously had no difficulty in waking him and that he did

not see anything abnormal about CHRISMAN when he left his sea cabin." Lieutenant Fuzy testified: he "saw CHRISMAN when he woke up and that he looked a little disoriented as he had just got up." Accordingly, no officers stated "despite their efforts to wake him, CHRISMAN usually a light sleeper, failed to stir." The L.A. TIMES reporting was clearly intended to convey a false impression that CHRISMAN was unable to attend to his duties, an impression inconsistent with the testimony of the witnesses.

On October 4, 1984, the L.A. TIMES' article entitled: "BOSUN SAYS CHRISMAN TOLD HIM TO SHUT-UP ABOUT SHIP GROUNDING" included the following paragraph:

> Several days after his ship went aground in Hawaii, Captain Willard (Bud) Chrisman admonished a crewman to shut-up and "not spread around" word of the accident. Chief Petty Officer Heersema's sworn statement bolstered the Navy's assertion that CHRISMAN, accused of being drunk when the grounding occurred January 24, 1984, attempted to hide from his superiors the true circumstances surrounding the incident.

Heersema had testified: "he told me to tell the truth" about the grounding. This testimony was not reported. Rather, his testimony, which did not mention Parkhurst [CHRISMAN's superior] and was elicited on cross-examination, was reported out of context and edited so as to convey to the reader the false impression that Heersema didn't speak to Parkhurst because CHRISMAN told him not to.

The October 4, 1984 TIMES' article also stated:

> Officers testified that CHRISMAN assured them after the grounding that his friend, a fellow officer, was to investigate the incident and that no one was going to be found culpable. (Emphasis added).

This suggested that there was testimony from which an average person would infer an agreement between Parkhurst and CHRISMAN that the investigation would be a whitewash. No testimony supported the TIMES' accusation and choice of the use of the verb "assured" and the word "culpable." Only two officers testified that CHRISMAN

had spoken to them concerning Captain Parkhurst's investigation: Lt. Kurzawa, who testified that CHRISMAN said "Captain Parkhurst would conduct a fair investigation"; and LtJG O'Neil, who testified "CHRISMAN informed the Chiefs and Officers no one had anything to worry about concerning the Parkhurst investigation implying that things might be smoothed over," and also that "CHRISMAN told them to speak freely and hold nothing back."

The October 4, 1984 TIMES' article goes on to state:

> . . .Coulapides questioned CHRISMAN's tactics on the night of the grounding: Coulapides, who has spent 39 years in the Navy, said that, in many ways, CHRISMAN's actions weren't those of a "reasonable and prudent" skipper. . .." (emphasis added)

This is an untrue and unfair summary of Coulapides' testimony as he never used the phrase "in many ways Chrisman's tactics weren't those of a reasonable and prudent skipper," and, in fact, did not disagree with several of his tactics.

Moreover, the October 4 article did not report the testimony of the civilian harbor pilot, Captain Geronimo, who was on board the evening of January 24, 1984 to guide the ship from the harbor. Geronimo testified "CHRISMAN was not intoxicated," and that CHRISMAN handled the ship correctly. By consciously deleting any reference to Captain Geronimo and failing to summarize his testimony, the TIMES conveyed an unfair summary of the gist of the October 3 testimony of the experts.

Nor did the TIMES report on October 4, 1984, the exculpatory testimony of Lt. Perine and Lt. Smith, who both testified CHRISMAN "was not intoxicated/acted normal" and did not attempt to cover-up the incident by telling them Parkhurst was a friend, again conveying an erroneous impression as to the strength of the Navy's case.

The L.A. TIMES printed an article on October 5, 1984 entitled: "DRAMA LOW KEYED

AT COURT-MARTIAL." Freed wrote a "feature story" rather than an article presenting an accurate account of CHRISMAN's defense. The testimony, which was not reported, included a civilian, Mr. Ken McKnight, who testified he was "with CHRISMAN all day, CHRISMAN was not under the influence of alcohol, and he too became ill after the fish dinner"; Petty Officer Reese, who was next to CHRISMAN on the bridge, who testified CHRISMAN was "not intoxicated"; Petty Officer Stephens, who was on the quarter deck, who testified that he "heard rumors that CHRISMAN was drunk" but "knew it was not true because he saw CHRISMAN when he came aboard and he was not under influence"; and Petty Officer Decker, who repaired the LCU boat, and testified he "considered the damage minor."

Other exculpatory testimony which would have conveyed to a reader that CHRISMAN was not guilty of all of the charges was entirely omitted. Commander

Mottet, M.D, who testified "CHRISMAN's symptoms were more consistent with food poisoning rather than alcohol intoxication" and that "it is not abnormal for breath and vomitus to smell of beer if one had drank one beer with dinner"; Chief Pettette, who testified that "Seaman Meeweus is not honest," and that "CHRISMAN had never drank to excess"; Cdr. Hough, Commanding Officer of USS Montacello, who testified CHRISMAN had been his "professional acquaintance for several years and he had never seen or had heard of him abusing alcohol"; Captain McMannis, who testified he had "known CHRISMAN for several years and he was known as a superior athelete who never abused his body"; Captain Parkhurst, who testified he "conducted a thorough investigation" and that "CHRISMAN fully cooperated and did not attempt to hide anything"; and Captain Gimber, CHRISMAN's superior officer, who testified "CHRISMAN sent all appropriate reports on the grounding and damage in a

timely and accurate manner," and that he "never received any evidence CHRISMAN was intoxicated or attempted to hide any facts." In sum, a reader of the L.A. TIMES on October 5, 1984, by reason of the L.A. TIMES' decision to omit critical and important defense testimony, could and would have concluded that CHRISMAN was guilty, that his defense had no merit or substance, when in fact the contrary was true.

The TIMES' article of October 6, 1984, was entitled: "SKIPPER DENIES GOING AGROUND WHILE DRUNK." The text included this summary of the trial:

> Some crewmen have testified Chrisman appeared intoxicated. (Emphasis added.)

This was an unfair synopsis of the trial testimony: not one crewman had testified that CHRISMAN "appeared intoxicated" at any time during the trial. Although the Fourth District Court of Appeal, in its opinion, summarized Loessin's testimony by stating "he suspected Chrisman was drunk," in fact,

Loessin testified he "inferred CHRISMAN was intoxicated only because some of the guests of the Navy he observed were boisterous, but later determined CHRISMAN was not intoxicated."

The concluding article, published on October 7, 1984, appeared with the headline: "COMMANDER ACQUITTED OF DRUNKENESS." In the text, the TIMES again summarized the trial testimony:

> Crewmen testified that he [CHRISMAN] appeared drunk as he came aboard.

Once again, this synopsis of prior testimony was a blatant falsehood, and not an editorial oversight. A review of Freed's notes of the trial concerning the testimony of the witnesses reveals not one reference to the phrase "Chrisman appeared drunk as he came aboard." The word or phrase "not intoxicated" or "not under the influence," however, appeared six times in Freed's notes: in the testimony of Mr. Moats; Capt. Geronimo; Mr. McKnight; Petty Officer Reese; Chief Steel; and Lcdr. Loessin. The

words "appeared [or acted] normal" were written three times in Freed's notes: Lcdr. McCannel; Petty Officer Crawford; Petty Officer Stephens. In sum, Freed and the L.A. TIMES made a conscious and deliberate choice to publish only that which tended to injure plaintiff in the eyes of the public and his peers.

Additionally, the October 7 article states:

> [He] was found afterward passed out in his cabin.

No witnesses testified that CHRISMAN was found "passed out in his cabin" either before or after the incident. To choose such words was to convey to a reasonable person that CHRISMAN was so incapacitated on the evening of January 24 as to be stuporous, an impression clearly at odds with the testimony and not supported by Freed's notes of the trial.

The article also states:

> Chrisman arrived on the Thomaston as the ship backed out of the harbor. (Emphasis added)

In fact, witnesses had testified CHRISMAN arrived on the bridge five to ten minutes before the ship got underway and discussed the intended maneuvering with the civilian harbor pilot. No witnesses testified: "Chrisman attempted no other evasive actions" as the TIMES wrote, but rather Loessin and McCannel testified "Chrisman was doing everything possible to maneuver the ship out of danger." Again, the choice of words by Freed was to bolster the TIMES' view that CHRISMAN was unable to properly carry out his duties, rather than to tell the public what the testimony of McCannel, Geronimo, and others had been, which was that CHRISMAN was on the bridge before the ship got underway, conducting himself properly.

In sum, the literary license concept does not permit a newspaper to inaccurately describe events so as to "change the complexion of the affair." Since the articles were neither true nor fair, and the

omissions were such as to affect a reasonable person's understanding of the court-martial testimony, denying plaintiff a jury trial on the basis of the "fair reporting" privilege deprived plaintiff unconstitutionally of the right to seek damages for injury to his reputation. The effect of the court's decision was to create an absolute privilege for the defendant newspaper.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Supreme Court of California, by Affirming the Application of the Retraction Statute, California Civil Code § 48a, when Plaintiff, Because of his Status as a Member of the Armed Services on Overseas Duty, was Unable to Retain Counsel to Protect his Legal Rights, Deprived Plaintiff of the Protection Mandated by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 501, et seq.

Congress recognized when it passed the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 501, et seq., that because of the nature of the duties imposed upon members of the armed services, legal rights could be lost because a member of the armed services could not seek counsel or act within requisite statutory time limitations, and applicable limitations should therefore be tolled during the period of a plaintiff's military service. In the present case, by approving the lower court's use of the retraction statute and requiring plaintiff to prove "special damages" because he did not request a retraction within 20 days after knowledge

of publication of the articles, thereby limiting his libel claims, the Supreme Court of California ignored the mandate of Congress. In doing so, it not only deprived plaintiff of the opportunity to present his libel claims relating to the initial and three subsequent articles published by the L.A. TIMES, but also of the protection of the Soldiers' and Sailors' Civil Relief Act.

B. The California Retraction Statute, Civil Code § 48a, Because It Does Not Purport to Exclude From Its Protective Mantle a Newspaper that acts with Actual Malice, is Unconstitutional as Violative of the Fourteenth Amendment.

California Civil Code section 48a does not purport to exclude from its protective mantle a newspaper that acts with "actual malice." If no retraction demand is made, it limits a plaintiff defamed by a newspaper to "special damages," whether or not there is evidence of impairment of reputation, personal humiliation, and mental anguish and suffering. In light of this

Court's ruling in New York Times v. Sullivan 376 U.S. 254 (1964) limiting those instances where First Amendment protection is afforded newspapers, and its recognition "of the strong and legitimate interest in compensating private individuals for injury to reputation" Gertz v. Robert Welch, Inc., 418 U.S. 323 at 348-349 (1974) and Philadelphia Newspapers Inc. v. Hepps, U.S. 106 S.Ct. 1558 (1986), dissenting opinion at pg. 1570, the statute impermissibly affords a newspaper greater protection than allowed by precedent and our constitutional system.[7/] For, as the court held in Gertz v. Robert Welch, Inc., 418 U.S. at 350:

> The common law of defamation is an oddity of tort law, for it allows recovery of purported compensatory damages without evidence of actual loss.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

C. The Supreme Court of California, Denied Plaintiff Equal Protection and Due Process of Law Because (1) The Statements Published were Libelous Per Se; (2) Plaintiff Was not a Public Figure or Public Official; (3) There was Clear and Convincing Evidence that the L.A. TIMES Acted with Malice; and (4) Its Publications were not "Hot News."

A review of the intitial three articles authored by David Freed published by the L.A. TIMES (See, Appendix) reveals the publication of false accusations which were libelous on their face, e.g., that plaintiff was "drunk"; that he cautioned his subordinates not to tell the truth during the Navy inquiry; was a "disgrace"; "endangered 310 lives by his action," when leaving Hawaii several days later permitted water to enter the vessel causing the LCU incident, and that he attempted to cover-up the latter incident. Williams v. Daily Review, Inc. (1965) 236 Cal.App.2d 405, 411; Burnett v. National Inquirer (1983) 144 Cal.App.3d 991, 1013.

Proof of damage to reputation or to one's career is not a prerequisite to

stating a cause of action for libel. Gertz v. Robert Welch, Inc., supra, 418 U.S. at pp. 348-350. Where the defamation is libel per se, general damages are presumed as a matter of law. Allard v. Church of Scientology (1976) 58 Cal.App.3d 439 at 450, cert. den. 429 U.S. 1091 (1971). As this Court noted in Time, Inc. v. Firestone 424 U.S. 448 at 460 (1976), damages for libel per se can be presumed as a matter of law upon a showing of mere fault (private person) or reckless disregard (public official or figure).

The L.A. TIMES nevertheless argued that, pursuant to section 48a, it was entitled to summary judgment as to the first three articles it published as to which no retraction demand had been made because as a matter of law, CHRISMAN could not prove that its conduct caused him "special damages." The trial court recognized that CHRISMAN had presented sufficient facts to create a jury issue as to whether the

articles caused him to suffer damage in his profession and occupation and, therefore, did not need to reach the constitutional issues. Under the circumstances of this case -- the clear and convincing evidence of actual malice and the L.A. TIMES' admission that the May 20, 1984 article was not "hot news" -- the Supreme Court of California's ruling which accepted the L.A. TIMES' argument premised upon Civil Code section 48a, raises serious constitutional issue:

(1) Section 48a was intended by the legislature to afford limited protection to those publishers who, because of time constraints, make inadvertent errors. Field Research Corp. v. Superior Court (1971) 71 Cal.2d 110, 114; Werner v. Southern California Associated Newspapers (1950) 35 Cal.2d 121, 128, appeal dismissed, 340 U.S. 910 (1951); Burnett v. National Enquirer, Inc. (1983) 144 Cal.App.3d 991, appeal dism. 465 U.S. 1014. In granting to news-

papers privileges denied to others and depriving a plaintiff defamed by a newspaper of the right enjoyed by plaintiff defamed by others, including a jury trial as to general damages, section 48a is arbitrary and unreasonable, unconstitutional and on its face violative of the the equal protection and due process clauses of the Fourteenth Amendment.

(2) By limiting CHRISMAN to "special damages" and by finding that there was no proof that defendant's conduct caused special damages, thereby denying plaintiff a trial and recovery of general damages because he did not serve retraction demands, the Supreme Court of California imposed a heavier burden on plaintiff than allowed under the United States Constitution. Where a private figure libel plaintiff is involved, the First Amendment does not require the court to "tip the scales in favor of protecting the speech merely because the speech addresses matters

of public concern." Gertz v. Robert Welch, Inc., supra, at 345-346; Time Inc. v. Firestone, supra, at 454-456; Philadelphia Newspapers, Inc. v. Hepps, ___ U.S. ___ 106 S.Ct. 1558 (1986).

(3) The L.A. TIMES did not demonstrate that plaintiff was not entitled to the status of a private figure; and plaintiff offered evidence that he was a private figure and not a public official. Hutchinson v. Proxmire, 443 U.S. 111 (1979); Manguso v. City of Oceanside (1984) 153 Cal.App.3d 574. He neither had access to nor employed the news media to counter the L.A. TIMES charges, and he did not inject himself into the limelight. Simply because he is a Naval officer does not mean he was a "public official" because he neither made policy nor exercised discretion. New York Times v. Sullivan 376 U.S. 254 (1964).

/ / /

/ / /

D. By Denying Plaintiff a Jury Trial on the Initial Articles Written About Him, The Supreme Court of California Unconstitutionally Expanded the Neutral Reportage Doctrine.

The scope of the "neutral reportage" privilege is limited to ensure that the media is not granted absolute immunity to espouse and concur in unwarranted attacks or to concur in charged by others. Ciancini v. New Times Publishing Co., 639 F.2d 54, 69-70 (2d Cir. 1980).[8]/ The Supreme Court of California affirmed the decision of the Appellate Court that the L.A. TIMES articles were not the "legal cause" of plaintiff's injuries and "it cannot be held liable." By implication it unconstitutionally expanded the neutral reportage doctrine,[9]/ and disregarded this court's dictates in Curtis Publishing Co. v. Butts, 388 U.S. 130, at 155 (1967), that even public figures and public officials (which plaintiff was not) may recover damages for the publication of "defamatory falsehood whose substance makes substantial

damage to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

E. Where a Comparison Between the Transcript of Judicial Proceedings and a Newspaper's Publications Reveals Editing and Deleting such that the Nature and Contents of the Proceedings are Misrepresented, is it Constitutionally Permissible to Invoke the Literary License Doctrine?

In the present case, the L.A. TIMES stories and headlines did not capture the "gist and sting" or the "substance of the proceedings."[10]/ The L.A. TIMES, throughout its reporting on the trial, did not merely "characterize" or "summarize" the testimony, but rather edited the testimony so as to convey an erroneous impression of the strength of the government's case and the weakness of CHRISMAN's defense. Because the articles were neither true nor fair, application of Civil Code section 47(4) and a fair-reporting privilege was unconstitutional. Schiavone Construction

Co. v. Time, Inc. 735 F.2d 94 at 97-98 (2nd Cir. 1984), 619 F.Supp. 684 at 708 (D.C.N.J. 1985).[11/]

In Gertz v. Robert Welch, Inc., 418 U.S., supra, this court determined that the First Amendment does not confer an absolute privilege to defame; it held that the fact that a newspaper publication concerned a public issue did not by itself entitle a libel defendant to the constitutional protection of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Later, this court, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., __ U.S. __, 105 S.Ct. 2939 (1985), in its plurality opinion, concluded that when defamatory statements do not involve matters of public concern, "actual malice" need not be proved to recover presumed and punitive damages. Thus, this court again recognized that the First Amendment does not compel granting absolute immunity from defamatory publications. Even if the articles were matters

of "public concern," if this court were to sanction the employment of the literary license doctrine where, as here, the editorial process resulted in a gross distortion of the contents of a judicial proceeding, it would in effect confer absolute immunity upon the press.

CONCLUSION

The invocation by the California courts of the retraction statute and the literary license doctrine as codified in California Civil Code section 47(4) to bar plaintiff's claims that he was libeled by defendant's reports of judicial proceedings where: (1) the plaintiff was in the armed services and entitled to the protections of the Soldiers' and Sailors' Relief Act; (2) the defendant's publications were libelous per se; (3) plaintiff asserted he was a "private figure" and the defendant offered no contrary evidence; (4) the publication was not "hot news"; and (5) the plaintiff produced clear and convincing evidence of

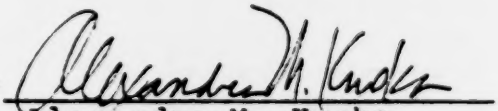
actual malice to deny plaintiff a jury trial on general and special damages, raises substantial constitutional issues, which have not been decided by this court.

The instant action presents this court with a full record and the opportunity to define a "public official" and clarify the definition of "private figure," and whether the literary license doctrine confers absolute immunity. It is appropriate for plenary consideration by this court.

Accordingly, appellant respectfully urges this court to note probable jurisdiction and grant plenary consideration of the questions presented herein with briefs on the merits and oral arguments.

Respectfully submitted,

Dated: Nov.14, 1988 **COPPO & COSGROVE**

By: 

Alexandra M. Kwoka
Carlo Coppo
Attorneys for Appellant
WILLARD G. CHRISMAN

AMK:gvb[3.2]

FOOTNOTES

1 Plaintiff's response included a Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment or Adjudication of Issues, Plaintiff's Statement of Disputed Material Facts, the Declaration of Willard G. Chrisman, the transcripts of the Deposition of David Freed, the author of the articles, and the court-martial transcript. He also filed the Declaration of LCDR Michael Loessin, the Executive Officer who was on the bridge of the USS THOMASTON with CHRISMAN on the evening of January 24, 1984.

2 It included a personal letter to CHRISMAN dated June 16, 1984 from his superior, in which Parkhurst wrote: "you were relieved because of a newspaper article which embarrassed the Navy. . .," as well as a summary of the deposition of Parkhurst.

3 It included his Declaration in which he advised the court that he was in Japan when the initial article was published, and explained why he had not made timely retraction demands; he referred the court to the Soldiers' and Sailors' Relief Act.

4 David Freed admitted in his deposition that the L.A. TIMES' policy was not to publish on the basis of unattributed sources, who are less credible than sources who would allow their names to be used.

5 A Navy investigation conducted by Parkhurst had concluded that the grounding was caused by several factors, including gale force wind and loss of one of the ship's two main engines, and that there was no need for punitive or disciplinary action against CHRISMAN.

6 CHRISMAN was found not guilty of all the charges regarding intoxication and a "cover-up"; he was found guilty of only a single charge of simple negligence: "negligently hazarding his vessel," a charge which standing alone, would not have resulted in a court-martial. CHRISMAN, despite his accomplishments and record, was not reassigned to command a vessel and has not been promoted.

7 As Justice Stewart wrote in his concurrence in Rosenblatt v. Baer, 383 U.S. 75, 92-94:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.

8 As the court held in Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir.) cert. den. 434 U.S. 1002 (1977):

> A publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage, but rather assumes responsibility for the underlying accusations.

9/ The court relied on Werner v. Hearst Publications, Inc. (1944) 65 Cal.App.2d 667 when it held that because the Navy launched its own investigation, "there was no causation and no liability."

10 As an example, prosecution witnesses on the first day were testifying that plaintiff was "not intoxicated" and

appeared normal, and that officers determined to allow water to enter the well-deck without advising CHRISMAN causing the LCU incident, but the L.A. TIMES reported otherwise.

11 As the court in Schiavone wrote, citing the Restatement (Second) of Torts:

> Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence. . ..
>
> 735 F2d at 97.

88-844

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLARD G. CHRISMAN
Appellant

v.

THE TIMES MIRROR COMPANY
Appellee

On Appeal From The Judgment of the Court of Appeal of California Fourth Appellate District Division One

APPENDIX

Alexandra M. Kwoka
Carlo Coppo
COPPO & COSGROVE
11975 El Camino Real
Suite 303
San Diego, California 92130
(619) 481-2392

Attorneys for
Appellant

1321

TABLE OF CONTENTS

(i.) Order of the Court of Appeal, State of California, Case No. D006534, entered 5/9/88 granting writ of mandate directing that summary judgment be entered for L.A. Times.

(ii.) 1. Minutes of the hearing of 6/5/87 on the Times' Motion for Summary Judgment before the Hon. Mack P. Lovett, Case No. 541625.

(ii.) 2. Ruling of 6/19/87 on L.A. Times evidentiary objections to declaration of M. Loessin, submitted in opposition to motion for summary judgment, Case No. 541625.

(ii.) 3. Ruling of 6/25/87 on summary adjudication of issues #3 and #5 taken under submission on 6/5/87, Case No. 541625.

(ii.) 4. Nunc Pro Tunc Order of 6/29/87 re Effect of Minutes of 6/5/87 hearing, Case No. 541625.

(ii.) 5. Order of 9/22/87 Ct. of Appeal, Case No. D006534, denying L.A. Times' petition for writ of mandate.

(ii.) 6. Order of 11/12/87 of the S.Ct. of California, Case No. S002655, granting L.A. Times' petition for review of order of 9/22/87.

(iii.) 1. Order of the Court of Appeal, Case No. D006534, entered 5/20/88 denying Chrisman's petition for rehearing.

(iii.) 2. Order of the Supreme Court of the State of California, Case No. S002655, entered 7/28/88 denying Chrisman's petition for review.

(iv.) 1. Notice of Appeal to the S. Ct. of the U.S. filed 10/26/88, in the Ct. of Appeal, Case No. D006534.

(iv.) 2. Certificate of Service re: Notice of Appeal filed 10/26/88.

(iv.) 3. Notice of Appeal to S.Ct. of the U.S. dated 10/20/88, delivered but not filed by the S.Ct. of California, Case No. S002655.

(iv.) 4. Certificate of Service dated 10/20/88 evidencing service of Jurisdictional Statement on opposing counsel.

(iv.) 5. Certificate of Service dated 10/24/88 evidencing service of Jurisdictional Statement on Atty. General of California.

(iv.) 6. Certificate of Service dated 11/18/88 evidencing service of Jurisdictional Statement and Appendix.

(v.) Newspaper Articles published in the L.A. Times

1. 10/7/84
2. 10/6/84
3. 10/5/84
4. 10/4/84
5. 10/3/84
6. 8/29/84
7. 6/22/84
8 5/20/84

F I L E D

MAY 9, 1988

Court of Appeal Fourth

District

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH

APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE TIMES MIRROR COMPANY,

Petitioner,

v.

SUPERIOR COURT, etc., D006534

COUNTY OF SAN DIEGO,

Respondent. (Super. Ct. No. 541625)

WILLARD G. CHRISMAN,

Real Party in Interest.

Proceedings in mandate after denial of summary judgement. Honorable Mack P. Lovett, Judge. Writ granted.

Willard G. Chrisman (Chrisman) was captain of a Navy shop that ran

aground in Hawaii, January 24, 1984. He was courtmartialed for negligently hazarding his ship and acquitted of other charges including being durnk on duty. The Los Angeles Times (Times)[1] ran seven articles about the incident and subsequent court martial hearings which Chrisman claims were libelous. The first allegedly libelous article appeared on May 20, 1984; the second article, which reported that there would be a court martial, was in the papers on August 29, 1984. The court martial began on October 2, 1984, and the next five articles appearing from October 3 - October 7, 1984, reported each day on the previous day's court martial proceedings. Chrisman filed suit in seven counts for libel. Times brought a motion for summary judgment which was denied. A petition for writ

---

[1] Petitioner, The Times Mirror Company, publishes the Los Angeles Times.

of mandate was then filed in this court. That was denied with two justices beleiving there were triable issuesof fact as to whether the articles were fair and true reports and as to whether the Times' initial article caused the Navy's charges against Chrisman; one justice dissented believing the Times' articles were not the legal cause of Chrisman's damages. The Times petitioned for review in the California Supreme Court. That court granted review and then transferred the case to us with directions to issue an alternative writ. After the briefing pursuant to that order and oral argument, we grant the petition for mandate.

The first article, published May 20, 1984, was captioned "Navy Officers Say Drunk Captain Caused Grounding" and reported "[n[aval authorities said they have launched a formal investigation . . . ." The Times argues that

since, as the article pointed out, the Navy had decided to reopen its investigation six days before the publication of this first article the Navy, not the Times, is responsible for any damage which may have been suffered by Chrisman. The first Navy investigation into the ship's grounding commenced just after the incident and concluded that gale force winds and loss of one of the ship's two main engines had caused the accident. There was no need for disciplinary action because Chrisman had acted responsibly. In May 1984 after the Navy had concluded its first investigation, the Times, through a "stringer," got the allegation that Chrisman had grounded the ship because he was intoxicated. David Freed, after talking on the phone purportedly with three unnamed Navy officers, wrote an article which he sent for the Navy to preview before it appeared in the paper.

On May 14, 1984, the Commander of the Naval Surface Forces advised the JAG that on May 10, 1984, he had gotten an inquiry from the Times and directec that the investigation of the ship running aground be reopened. On May 20, 1984, the article appeared. In the article the Times took credit for having the Navy reopen its investigation, an investigation it suggested had been shoddily performed as part of a cover-up. Chrisman's immediate supervisor, Captain Gimber, wrote to Chrisman in a letter dated May 24, 1984:

> "Prior to the receipt of text of the L.A. Times article it was difficult to grasp precisely why the investigation was being reopened. The serious allegations made must be addressed if the American people are to retain their confidence in the U.S. Navy."

On June 16, 1984, Chrisman was relieved from the ship's command. Captain Parkhurst wrote to him shortly after to say:

> "[Y]ou [Chrisman] were relieved because of a newspaper article which embarrassed the Navy."

Notwithstanding what Chrisman's colleagues may have thought, our question is whether the Times was the legal cause of his damages. In Werner v. Hearst Publications, Inc. (1944) 65 Cal.App.2nd 667, the defendand had written a letter to the Satat Bar complaining that Werner had acted unethically and had engaged in acts of dishonesty and moral turpitude. The State Bar issued Werner a notice to show cause why he should not be disciplined. Ultimately the discipline matter was diamissed and Werner bought suit against the defendant alleging the initiation of disbarment proceedings was due to the defendant's malicious act by which it intended to damage

his reputation in the community. The court opened that it was not the letter to the State Bar that initiated the disciplinary proceedings; rather, it was the State Bar after its own investigation that did so. Thus there was no causation and no liability as to the defendant. Here it is the same situation. The Times article sent to the Navy did not cause the court martial. Rather, the Navy responded to the article by launching its own investigation, an article 32 investigation, the Navy equivalent to a grand jury investigation. After that investigation the Navy, on August 24, 1984, ordered that a general court martial be convened. Thus, it was the Navy that was the legal cause of the court martial. In that the Times article was not involved in this decision, it was not the legal cause and cannot be held liable as the articles I and II.

Chrisman's court martial began on October 2, 1984, and continued for five days The judge found Chrisman was not guilyt of the allegations that he was intoxicated, that he had failed to report the grounding properly, or that there was a cover-up. He was found guilty of "negligently hazarding his vessel."

The Times says the court martial is a judicial proceeding and thus, their articles about these proceedings are priviledge under Civil Code section 47, subdivision (4). However, the protection given to public journals is confined to "fair and true" reports of the proceedings.

Petitioner says the law is in conflict whether the determination that a report is "fair and true" is a question of law or one of fact. In support of its contention Times cites cases where summary judgement or nonsuit was granted and the court ruled as a matter of law that the jour-

nal's article was a fair and true reflection of the judicial proceedings. (Kilgore v. Younger (1982) 30 Ca;/3d 770.777; Jennings v. Telegram-Tribune Co. (1985) 164 Csl.Spp,3f 119, 128-129; Green v. Cortez (1984) 151 Cal. App,3d 868, 873-874.) In so doing the court assesses whether "the gist or sting' of the report -- its very substance -- is accurately conveyed." If it is not, then the effect of the words and the question of fairness become ones for the factfinder. (McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal.App.3d 961, 975; see also Handelman v. San Francisco Chronicle (1970) 11 Cal.App.3d 381, 386-387.) We review the court-martial transcripts and the news articles to see if the latter accurately convey the substance of the former.

The first day of testimony revealed that Chrisman had been ashore with a group of Navy League guests from about noon on. He had consumed one beer for lunch but no one knew

The first day of testimony revealed that Chrisman had been ashore with a group of Navy League guests from about noon on. He had consumed one beer for lunch but no one knew how much alcohol he might have consumed with his fish dinner. On the way back to the ship Chrisman fell asleep in the back seat. Among the persons returning to the ship the English chaplain was a bit under the influence and the others, save for Chrisman, were loud and boisterous. It sppeared they had been drinking although no one knew if it had been to excess. Although the witnesses reported that Chrisman was not under the influence, on that evening he was described as coming up the prow very slowly with heavy steps and using the railing for support. Another witness described the captain as slightly drown, a little pale and with bloodshot eyes. He spoke

slowly and seemed a bit unsteady as he leaned against the bulkhead. There was a navigation briefing that night. In contrast to his usual practice, Chrisman did not attend. After the briefing the executive officer called several others aside to talk "about the condition of the . . . about his concern about the Captain." The executive officer seemed worried. That evening Chrisman vomited liquid in his cabin. The smell was of drinking alcohol. Chrisman slept and those who tried to rouse him found it difficult if not impossible to do so. Two witnesses testified that the next day Chrisman looked hung over. An expert witness who testified as to possibility of food poisoning opened that the most consistent diagnosis was acute alcohol intoxication based on reports Chrisman was unsteady coming on board, was stuporous and vomiting in his cabin and the next day appeared quite drawn.

The article of October 3 is captioned, "Drunkenness Denied by Skipper" with the subtitle "Chrisman Says He Had Food Poisoning When Ship Ran Aground." The first fifteen paragraphs discuss the opening argument by Chrisman's lawyer, Bogart, and that the case is to last a week and be heard by a Navy judge. It then continues with Bogart's portrayal of Chrisman as an officer with an unblemished record, the charges, and that Chrisman had been relieved from duty. Next is the report that the prosecution thought the situation called for a court-martial and that they called seven witnesses the first day "who testified that Chrisman exhi- various signs of intoxication . . . ." The following 11 paragraphs report on the testimony; the food poisoning expert's opinion that the most consistent diagnosis was intoxication; that Chrisman had been ashore that day and

consumed one beer at lunch; that the officer of the de[illegible] watched Chrisman as he came aboard, came up to the prow slowly, steps heavy, often leaning on the rail for support; that Chrisman could not be roused from his bed and missed, for the first time, the navigational briefing; and that the seaman who took him tomato juice found Chrisman huddled in his bunk, the trash can filled with vomit and the cabin reeking of alcohol. THe article concludes that soon after getting underway a strong wind threstened to run the ship aground and there was a tttempt to "twist" the ship which failed.

Having read the testimony, the article appears to capture its "gist and sting." We note that the article tracks the testimony of each of the seven witnesses in the order the testltified. Thus, we look for real party to direct us to the specifics which

he believes give rise to a cause of action. Chricman points to several portions of testimony which were omitted. One is the testimony of the expert about the causes and effects of food poisoning. However, the article, indeed even its subtitle, says that Chrisman's defense was food poisoning. Next is the testimony of a dinner partner who said he also ate fish that evening and fell ill. However, a review of the witness's testimony shows he said nothing about eating fish but rather that he had been sitting at another table and did not know if Chrisman had had anything to drink with dinner.

Chrisman refers us to a comparison of trial testimony and the news articles which he presented to the trial court. As to the article of October 3, he suggests there was testimony that was not included and should

have been such as two witness reports that Chrisman appeared normal when he arrived on the bridge, the testimony that the crew let water in the well deck without telling Chrisman and the testimony of a witness who said although he saw Chrisman weaving he did not smell alcohol. The omissions are minor and in context cumulative. In view of the totality of th testimony these omissions do not make the article in question less that true or fair.

The second day of testimony centered on the incident of going aground and the measures that were taken first to prevent and then to remedy the situation. An authority on amphibious assault ships testified as to what, in his opion, had happened and discussed various courses of action. No witness who saw Chrisman on the bridge that night thought he was intoxicated.

But observers did say he appeared quiter than usual. Several witnesses testified with regard to what Chrisman told them about the upcoming JAG Manual INvestigation. Chrismansaid the investigator, Parkhurst, was "his friend and there was nothing to worry about," and to speak freely and not hold anything back. However, one witness, the bosun, admitted that he had earlier told counsel that CHrisman told him to shut up and not spread around what had happened.

It was this that served as the basis of the Times' caption, "Bosun Says Chrisman Told Him to 'Shut Up' About Ship Grounding," the following day. The article begins with three paragraphs describing more fully the bosun's testimony and that the captain had said a fried would be doing the investigation and no one would be found culpable. THe article then continues

with the prosecution's charge of intoxication, Chrisman's defense of food poisoning, the charges brought and the penalty should there be a conviction. The next five paragraphs relate the backing of the ship, the going aground and the unsuccessful attempt to twist out of it. Those on the bridge, the article says, found the captain strangely quiet. Then the article discusses the investigation by Parkhurst and his report which made no mention of alcohol and recommended no punitive action. Officers outraged at the report contacted the Times and the Navy renewed its inbestigation. And the paper concludes, the expert who testified said that many of the captain's actions that night were not reasonable or prudent.

The article fairly describes the testimony of October 3 1984. Chrisman brings up a number of specifics which

he believes makes the article less than fair and true. These are: the failure to report that the civilian pilot, Geronimo, agreed with the plan to twist the ship; the failure to report that Chrisman said Parkhurst would conduct a fair investigation; the failure to specify that Chrisman told the bosun not to discuss the matter around those in authority; and the failure to report the testimony of two witnesses. As to the last, the paper is under no obligation to report the testimony of each and every witness. Omission of Geromin's testimony does not detract from the report of the overall testimony for that day. We find nothing in the pages cited to us that Parkhurst would conduct a fair investigation. Rather on cross-examination in response to a leading question the witness agreed that Parkhurst was a "fair man." Contrary to what Chrisman suggests the bosun testified that Parkhurst had not told him to limit his discussion

of the matter to Naval personnel.

The testimony on the third day included three witnesses who observed Chrisman on the bridge on the night ing question and who reported that he appeared normal, the testimony of two persons who inspected the damage to the ship, the testimony of an expert who said the symptoms Chrisman exhibited were consistent with food poisoning and the testimony of five persons who said Chrisman was a persone do moderate habits. The Times' article that day is entitled "Drama Low-Keyed At Court-Martial" with the subtitle "Navy Skipper Being Tried Without Any Military Pomp." The article does not purport to report the testimony of the preceding day instead focusing on the courtroom and the players in the drama, the judge and the lawyers. Chrisman argues the Times did not include the testimony of four colleaguesthat he was a man of moderate temperament. However, an noted earlier this article did not

report on the previous day's testimony but rather is in the nature of a background article.

On October 5, 1984, the high point was when Chrisman took the stand. He concluded his testimony by saying he was not drunk on the day in question and this was the basis for the Times' headline, "Skipper Denies Going Aground While Drunk." The article continues that closing argument is expected soon, repeats the charges and reports that Chrisman spent an hour testifying. As to the testimony, the article accurately reflects that Chrisman said he went running that morning, went ashore about noon, drank his fourth beer of the day with his dinner of mahi-mahi which had a strong taste. He felt ill on the way back to the ship and some crewmen testified he appeared intoxicated. Chrisman says he had food poisoning. The article

then goes on to report the testimony of Chrisman's executive officer to the effect he suspected Chrisman was drunk but later was convinced otherwise by Chrisman's competence on the bridge. He testified he went to get Chrisman for the navigation briefing and was told "you take it." Chrisman looked sick. After the navigation briefing the executive officer said he held another briefing where he told the department heads that he was worried about the captain's condition, that the captain was intoxicated. But, on the bridge the captain performed well and had he not been there damage could have been more severe. The article then recounts that high winds that might contributed to the problem and the unsuccessful "twist," and that Chrisman thought there was a mechanical failure but the crew did not. A comparison of the testimony shows

the article is a true and fair report.

The final day of the court martial was devoted to closing argument and findings. The Times article was captioned, "Commander Acquitted of Drunkenness" and subtitled "But Navy Judge Find's Him Negligent in Warship Accident." The article which follows presents a fair and true summary of the case including opinions on the verdict. Chrisman does not complain of any specifics in this article.

Our review of the transcripts day by day and comparison with the corresponding Times' articles shows the articles are true and fair as a matter of law. The prosecution version of the facts, the defense version of the facts and the decision, are all reported. Chrisman's major objection seems to be that the Times referred to him a possibly being "intoxicated" or "drunk" on the night in question

when not one witness (except perhaps the executive officer) testified that he appeared intoxicated; that the times reporting suggested there was a coverup when there was not. However, Chrisman was charged with being intoxicated and the symptoms he exhibited, walking slowly with heavy step, unsteady and using the railing for support, bloodshot eyes, vomiting, smell of alcohol are consistent with intoxication. The omission of certain testimony is within the discretion of the newspaper. To omit the information about the well deck was permissible because the articles made clear there might be other factors involved. Finally as to the alleged coverup the paper reported testimony on both sides. These were fair and true reports protected by the privilege of Civil Code section 47, subdivision (4).

Let a peremptory writ issue directing the superior court to vacate its order denying summary judgement and to enter a new and different order granting judgment for the defendant. The alternative writ is discharged.

/s/ ?

KREMER, P.J.

WE CONCUR:

/s/

WIENER, J.

/s/

WORK, J.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

Date June 5, 1987 Minutes Dept. 25

PRESENT: HON. MACK P. LOVETT

CLERK TINA KURA REPORTER EMILY JONES

BAILIFF JACK PLUM

541625 WILLARD G. CHRISMAN
(CHRISMAN), Plaintiff,
vs. By: Carlo Coppo
THE LOS ANGELES TIMES,
and DOES 1through 50,
inclusive (TIMES),
Defendants.
By: Rex Heinke
Jeffery Klein

1. 10:00 a.m. This being the time previously set for TIMES' Motion for Summary Judgment, there appeared Rex Heinke and Jeffrey Klein, representing TIMES. Representing CHRISMAN was Carlo Coppo.

2. The TIMES' evidentiary objection filed with the Court October 31, 1986 to Declaration of Michael Loessin was taken under submission by the Court. The copy of Loessin's declaration filed with the Court was single-spaced and the copies of the declaration in possession of counsel were double-spaced. The evidentiary objections filed by page and paragraph. A copy of Loessen's declaration, double-spaced, consisting of five pages, was filed with the Court to replace the 21/2 page single-spaced declaration previously filed with the Court.

3. The Court ruled on TIMES' evidentiary objections filed October 29, 1986 as follows:

A. Declaration of Dianne Chrisman dated October 20, 1986

The Court sustains TIMES' hearsay objection as to Page 3, Lines 14,15,16,17 and 18

and Page 4, Line 17. The balance of TIMES' objections is overruled for the reasons stated in open court on June 5, 1987.

B. Declaration of Willard Chrisman dated October 20, 1986

The Court overrules objection to Pages 1 through 16 on the grounds of relevancy. On Page 4, Lines 3 through 15, the Court overrules TIMES' objection and finds that defendant does have personal knowledge.

The Court sustains TIMES' objection on the grounds of no personal knowledge as to the follwoing portions of the declaration: (i) Page 17, Lines 1-20; (ii) Page 20, Lines 4-27; (iii) Page 21, Lines 1-7 and 24-27;

(iv) Page 22, Lines 1-6.

The balance of the objections to Willard Chrisman's declaration by TIMES is overruled for the reasons stated in open court this date.

C. TIMES' objections as listed in Paragraphs 3 through 14 consisting of objection to transcript of court-martial and other exhibit submitted by plaintiff in opposition to TIMES' motion for summary judgment are overruled for the reasons stated in open court on June 5, 1987.

4. Ruling on Times-Mirror's evidentiary objections to evidence submitted by plaintiff in support of his supplemental opposition to motion for summary judgment filed with the Court May 23, 1987. TIMES" objections as contained

in the ten page filing with the Court are overruled for the reasons stated in open Court with the exception of Paragraph N, Page 6, which deals with pages 137 through 142 of plaintiff's characterization of Parkhurst testimony. Objection is sustained. Objections by TIMES to deposition of David Freed and Nigel Parkhurst are overruled.

5. The Court denied TIMES' motion summary judgment. The Court finds there is a triable issue of fact based upon the depositions of CHRISMAN, David Freed and Captain Nigel Parkhurst.

6. Summary adjudication of issues:

ISSUE No. 1:

No correction demand was ever made for the articles published by Times-Mirror on May 20, August 29, and

October 3, 1984 ("Articles One, Two and Three"). As to those articles, plaintiff is therefore limited to his special damages, if any, pursuant to Civil Code section 48a.

Decision: Grant.

ISSUE No. 2:

The correction demand for the articles published by Times-Mirror on October 4, October 5, October 6 and October 7, 1984 ("Articles Four, Five, Six and Seven"), was insufficient because it was not served on the publisher as required by law. As to those articles, plaintiff is therefore limited to his special damages if any, pursuant to Civil Code section 48a.

Decision: Deny.

ISSUE No. 3:

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

DATE June 5, 1987 MINUTES DEPT. 25

PRESENT: HON. MACK P. LOVETT

CLERK TINA KURA REPORTER EMILY JONES

BAILIFF JACK PLUM

Plaintiff cannot prove that he suffered any special damages as a result of a publication of the seven articles by Times-Mirror because he bases that claim on damages to his reputatuon and on actions that were taken by the Navy, not by TIMES-MIRROR.

Decision: Taken under submission on June 5, 1987.

ISSUE No. 4:

The court-martial of plaintiff, Cmdr. Willard G. Chrisman, was a judicial or other official proceeding within the meaning of

Civil Code section 47 (4).

Decision: Grant

ISSUE No. 5:

On October 3, October 4, October 5, October 6 and October 7, 1984, Times-Mirror published articles that reported on the charges, the testimony, and the outcome of plaintiff's court-martial. The references to plaintiff in Article Three through Seven were fair and true reports of the charges, the testimony and the outcome of plaintiff's court-martial, and were therefore absolutely privileged under California Civil Code section 47 (4).

Decision: Deny. The Court cannot find as a matter of law that it was fair and true report. In my opinion it was not a fair and true report, and thus a question of fact for a judge or jury if the report was fair.

ISSUE No. 6:

The references to the plaintiff in Articles Three through Seven published by Times-Mirror were reports of the charges, the testimony, and the outcome of plaintiff's court-martial, and were therefore absolutely privileged under the First and Fourteenth Amendments to the United States Constitution.

Decision: Deny.

ISSUE No. 7:

The references to the plaintiff in Articles Three through Seven published by Times-Mirror were reports of the charges, the testimony, and the outcome of plaintiff court martial, and were therefore absolutely privileged under Article 1, Section 2 of the California Constitution.

Decision: Deny.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

DATE June 19, 1987

PRESENT: HON. MACK P. LOVETT JUDGE

CLERK TINA KURA

BAILIFF N/A

REPORTER N/A

(Ruling on matter under submission)

(This is not a record of action occurring while Court in session.)

541625

WILLARD G. CHRISMAN (CHRISMAN), Plaintiff,

By: Carlo Coppo

vs.

THE LOS ANGELES TIMES, and DOES 1 through 50, inclusive (TIMES), Defendants.

By: Rex Heinke

RULING ON TIMES' EVIDENTIARY OBJECTIONS FILED WITH THE COURT

OCTOBER 1, 1986 TO DECLARATION OF MICHAEL LOESSIN SUBMITTED BY PLAINTIFF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

(Taken Under Submission on 6/5/870

1. TIMES' objection on the ground that Loessin's declaration fails to comply with Code of Civil Procedure 2015.5 is overruled. The Court finds substantial compliance with 2015.5.

2. TIMES" second objection dealing with Paragraph 3 on Page 1 through Page 3 is overruled. The Court finds the information contained therein is relevant to the issues before the Court.

3. TIMES' third objection to Paragraph 4 on Page 3 is sustained on the basis that Loessin lacks personal knowledge, and accordingly, this portion of the declaration lacks adequate foundation.

4. TIMES' objection to the last

sentence of Paragraph 4 of the declaration is sustained on the basis that he lacks personal knowledge.

5. TIMES' fifth objection directed to Paragraph 5 on Pages 3 and 4 is sustained, as the impact on other officers is irrelevant.

6. TIMES' objections to Paragraph 6 on Page 4 are overruled.

7. The balance of TIMES' objections commencing on Page 3 of the objection filed October 31, 1986 commencing with Line 18 thereof are overruled.

Dated: JUN 19 1987

Mack P. Lovett

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

DATE June 25, 1987

DECISION 35

PRESENT: HON. **MACK P. LOVETT** JUDGE

CLERK **TINA KURA**

BAILIFF **N/A** REPORTER **N/A**

(Ruling on matter under submission)

(This is not a record of action occurring while Court in session.)

541625

WILLARD G CHRISMAN

(CHRISMAN), Plaintiff, By:

Carlo Coppo

vs.

THE LOS ANGELES TIMES,

and DOES 1 through 50,

inclusive (TIMES-MIRROR),

Defendants, By Rex Heinke

Jeffrey Klein

RULING ON SUMMARY ADJUDICATION

ISSUES #3 AND #5

(Taken Under Submission on 6/5/87)

I. BACKGROUND

On June 5, 1987, after oral argument, the Court made a series of rulings concerning TIMES-MIRROR's motions for summary judgment, summary adjudication and various evidentiary objections. The Court took under submission for future ruling summary adjudication #3, which reads as follows:

"Plaintiff cannot prove he suffered any special damages as a result of publication of the seven articles by TIMES-MIRROR because he bases that claim on damages to his reputation and on actions that were taken by the Navy, not by TIMES-MIRROR."

II. DECISION

Sumnmary adjudication #3 is denied

III. DISCUSSION

A crucial issue in the subject case is whether or not the newspaper article published on May 20, 1984

was a substantial cause of the U. S. Navy's decision to court-martial CHRISMAN. TIMES-MIRROR contenda that causation inthes case is a question of law and not fact, as CHRISMAN's special damages, if any, were caused solely by the actions of the U. S. Navy. While normally causation is a question of fact, TIMES-MIRROR contends that since only the U. S. Navy could have decided to reopen the investigation or to order a court-martial, there can be no issue of fact as to whether TIMES-MIRROR was the cause in part of CHRISMAN's difficulties with the U. S. Navy.

CHRISMAN contends that the trier of fact should have the right to review the conduct of TIMES-MIRROR in this case, since it involves the publication of a article which is in the nature of investigation reporting, as opposed to the publication

of an article relative to an event of public interest at the time of the event. CHRISMAN is entitled to his day in court so that the trier of fact may determine whether the publication of TIMES-MIRROR was a substantial cause in convening the court-martial which charged him with commanding a naval vessel while intoxicated. It is interesting to note that the second TIMES-MIRROR article supports CHRISMAN'S position, wherein the article states that an Admiral ordered an investigation of the incident after TIMES-MIRROR reported allegations of drunkenness by CHRISMAN. While the TIMES-MIRROR reporter may be mistaken in such belief, an issue of fact remains. Further , I find there is conflicting evidence on what did cause the Navy to reopen the investigation and convene a court-martial.

Concerning denial on June 5, 1987 of summary adjudication of Issue #5, counsel for TIMES-MIRROR vigorously took exception to the Courts ruling. Counsel requested the Court to set forth in the form of a written opinion each reason why the newspaper articles concerning the court-martial did not constitute a full and fair report pursuant to C.C §47 (4). It is my belief that the Court is not required to make such findings, since the transcript of the court-martial and the newspaper articles speak for themselves and can be considered by an appellate court in the same climate as an appellate court reviews a trial court's interpretation of a written contract. Accordingly, the Court's reasoning is not determinative in this situation. It remains my opinion that C.C. § 47(4) does not shield TIMES-MIRROR from trial

because, in my judgment, the articles 3 through 7 were biased against CHRISMAN and did not fairly report the proceedings. Further, by way of example, there was no testimony at the court-martial by anyone that CHRISMAN was intoxicated. Yet the implication of Articles 3 through 7 are the same as Articles 1 and 2, namely, that CHRISMAN has a drinking problem while on duty.

The Court is aware that generally in cases of this type the plaintiff is most interested in whether or not the story on him or her is true or false, whereas the issuer in the litigation tend to focus on how the newspaper did the story. I have attempted to analyze the case on the issue of how the story was done and not whether or not the newspaper articles were in all areas true and accurate.

Dated: JUN 25, 1987

Mack P. Lovett

MACK P. LOVETT

FILED

Robert D, Zumwalt, Clerk

JUN 29, 1987

By T. Kura

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CASE NO. 54125

NUNC PRO TUNC ORDER

RE EFFECT OF MINUTES

OF JUNE 5, 1987 HEARING

WILLARD G. CHRISMAN,

Plaintiff,

v.

THE LOS ANGELES TIMES,

and DOES 1 through 50, inclusive,

Defendants.

The Minuted of the June 5, 1987 Hearing on Defendant's Motion for Summary Judgment Or, In the Alternative, for Summary Adjudication of Issues, reflected my tentative rulings on the motion. A final order ruling on all the issues brought

by defendant will be entered by the Court in due course, and notice will be sent to the parties.

This order is effective

nunc pro tunc.

DATED: JUN 29, 1987

MACK P. LOVETT

MACK P. LOVETT

JUDGE OF THE SUPER-

IOR COURT

APPROVED AS TO FORM:

DATED: June 25, 1987

GIBSON, DUNN &

CRUTCHER

REX S. HEINKE

LINDA L. BERGER

TRACY POOL REEVE

THE TIMES MIRROR

COMPANY

JEFFREY S. KLEIN

/s/ BY:_____

TRACY POOL REEVE

Attorneys for

Defendant

THE TIMES MIRROR

COMPANY

DATED: 6/26/87

CARLO COPPO &

ASSOCIATES

/s/ By:_____

CARLO COPPO

Attorneys for Plain-

tiff

WILLARD G. CHRISMAN

F I L E D
Keenan G. Casady, Clerk
SEP. 22, 1987

Court of Appeal Fourth District

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE TIMES MIRROR COMPANY
Petitioners,
v.
SUPERIOR COURT, etc.,D006534
COUNTY OF SAN DIEGO,
Respondent. (Super. Ct. No. 541625)

WILLARD G. CHRISMAN,
Real Party in Interest.

THE COURT;

The petition for writ of mandate, opposition and reply have been read and considered by Presiding Justice Kremer and Justices Wiener and Butler. The petition is denied as there are triable issues of fact as to whether the articles were "fair and true report(s)" and whether the petitioner's initial articles caused the Navy to charge real party with commanding a vessel while intoxicated. J. Wiener would grant the petition believing the petitioner is not the legal cause of real party's damages.

/s/

KREMER, P.J.

Copies to: All parties

SUPREME COURT

F I L E D

NOV 12, 1987

Laurence P. Gill, Clerk

_____

DEPUTY

ORDER GRANTING REVIEW

AFTER JUDGEMENT BY THE COURT OF APPEAL

Fourth District, Division One,

No. D006534, S002655

IN THE SUPREME COURT OF THE STATE

OF CALIFORNIA

IN BANK

THE TIMES MIRROR COMPANY, Petitioner

v.

SUPERIOR COURT OF THE COUNTY OF SAN DIEGO

Respondent; CHRISMAN,

Real Party in Interest

Petition for review GRANTED. The matter is transferred to the Court of Appeal, Fourth Appellate District, Division One, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

LUCAS
Chief Justice

MOSK
Associate Justice

BROUSSARD
Associate Justice

PANELLI
Associate Justice

ARGUELLES
Associate Justice

EAGLESON
Associate Justice

Associate Justice

F I L E D

May 20, 1988

Court of Appeal Fourth District

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE TIMES MIRROR COMPANY

Petitioner,

v.

SUPERIOR COURT, etc., D006534

COUNTY OF SAN DIEGO,

Respondent. (Super. Ct. No. 541625)

WILLARD G. CHRISMAN,

Real Party in Interest.

THE COURT;

The petition for rehearing is denied.

/s/_____

KREMER, P.J.

Copies to: All Parties

SUPREME COURT

F I L E D

July 28, 1988

Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGEMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D006534

S002655

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE TIMES MIRROR COMPANY, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF SAN DIEGO, Respondent; CHRISMAN, Real party in Interest.

Petition for review DENIED.

/s/ LUCAS
Chief Justice

Received

Stephen M. Kelly, Clerk

October 26, 1988

Court of Appeal Fourth District

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE TIMES MIRROR COMPANY, Petitioner, v. SUPERIOR COURT, etc., COUNTY OF SAN DIEGO, Respondent.	D006534 (Super.Ct. No. 541624) (S.Ct. No. S002655)
WILLARD G. CHRISMAN, Real Party in Interest.	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that WILLARD G. CHRISMAN, the Real Party in Interest above-named, hereby appeals to the Supreme Court of the United States from the final

order of the Court of Appeal, Fourth Appellate District, Division One, State of California, entered May 9, 1988, directing that a peremptory writ issue to the Superior Court to vacate its Order denying summary judgment and to enter a new and different Order granting judgment for the defendant, the LOS ANGELES TIMES, rehearing and review of which was denied May 20, 1988, and which Order was affirmed by the Supreme Court of the State of California on July 28, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: Oct. 26, 1988 **COPPO & COSGROVE**

/S/_____

Alexandra M. Kwoka
Carlo Coppo
Attorneys for Real Party in Interest,
WILLARD G. CHRISMAN
11975 El Camino Real
Suite 303
San Diego, CA 92130

AMK:gvb[3.7]

CERTIFICATE OF SERVICE

I, Alexandra M. Kwoka, a member of the Bar of the Supreme Court of the United States, and one of the attorneys for plaintiff Willard G. Chrisman hereby certify that on the 26th day of October, 1988, I served a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the Court of Appeal for the Fourth Appellate District, Division One, as follows:

1. By having a copy of the Notice of Appeal personally served by a messenger service upon the Clerk of the Court at: 1350 Front Street, Suite 6010, San Diego, CA 92101;
and by placing in the United States mail, a copy duly addressed with first class postage prepaid to the Court of Appeal, Fourth Appellate District, Division One at the same address.

2. I also certify that on October 26, 1988, I served a copy of the Notice of

Appeal to the Supreme Court of the United States on the following parties and persons as follows:

a. By having personally served by a messenger service the Notice of Appeal at the following addresses:

Gibson, Dunn & Crutcher, 600 "B" St., Ste 2300, San Diego, CA 92101.

San Diego Superior Court, Department 25, 220 West Broadway, San Diego, Ca 92101

Attorney General of the State of California, 110 West "A" Street, San Diego, CA 92101

b. By placing in the United States mail, a copy duly addressed with first class postage prepaid to the above-named persons at the above addresses.

3. I certify that I served a copy of the Notice of Appeal on the Supreme Court of the United States by placing in the United States mail, the appropriate number of copies duly addressed with first class postage prepaid to the Supreme Court at the following address:

Supreme Court of the United States, 1 First

Street, N.E., Washington, DC 20543.

/S/_____
ALEXANDRA M. KWOKA

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

WILLARD G. CHRISMAN, **Appellant,** **v.** **THE TIMES MIRROR COMPANY,** **Appellee.**	NO. S 002655

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that WILLARD G. CHRISMAN, the appeallant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme court of the State of California denying WILLARD G. CHRISMAN's Petition for Review and affirming the order of the Court of Appeal, Fourth Appellate District, Division One, issuing a peremptory writ

directing the entry of summary judgment for defendant the L.A. TIMES, entered herein on July 28, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: Oct. 20, 1988 **COPPO & COSGROVE**

/S/_____
Alexandra M. Kwoka
Carlo Coppo
Attorneys for Appellant,
WILLARD G. CHRISMAN
11975 El Camino Real
Suite 303
San Diego, CA 92130

AMK:gvb[3.5]

CERTIFICATE OF SERVICE

I, Alexandra M. Kwoka, a member of the Bar of the Supreme Court of the United States, and one of the attorneys for plaintiff Willard G. Chrisman hereby certify that on the 20th day of October, 1988, I served a copy of the JURISDICTIONAL STATEMENT on Gibson, Dunn & Crutcher, as follows:

1. By placing in the United States mail a copy duly addressed with postage prepaid to Gibson, Dunn & Crutcher, 600 "B" Street, Ste. 2300, San Diego, CA 92101.

/s/_____

ALEXANDRA M. KWOKA

CERTIFICATE OF SERVICE

I, Alexandra M. Kwoka, a member of the Bar of the Supreme Court of the United States, and one of the attorneys for plaintiff Willard G. Chrisman hereby certify that on the 24th day of October, 1988, I served a copy of the JURISDICTIONAL STATEMENT on the Attorney General of the State of California, as follows:

1. By placing in the United States mail a copy duly addressed with postage prepaid to the Attorney General of the State of California, 110 West "A" Street, San Diego, California. 92101.

/s/_____

ALEXANDRA M. KWOKA

CERTIFICATE OF SERVICE

I, Alexandra M. Kwoka, a member of the Bar of the Supreme Court of the United States, and one of the attorneys for plaintiff Willard G. Chrisman hereby certify that on November 18, 1988, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND JURISDICTIONAL STATEMENT AND AMENDED APPENDIX on the interested parties in said action, by placing the appropriate number of copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Del Mar, California addressed as follows:

Supreme Court of the United States, 1 First Street, N.E., Washington, DC 20543

Gibson, Dunn & Crutcher, 600 "B" Street, Ste. 2300, San Diego, CA 92101

Attorney General of the State of California, 110 West "A" Street, San Diego, CA 92101

Clerk of the Court, Supreme Court of California, 3580 Wilshire Blvd., Ste 213 Los Angeles, CA 90010

Court of Appeal, Fourth Appellate District, Division One, 1350 Front Street, #6010, San Diego, CA 92101

San Diego Superior Court, Dept. 25, Judge Lovett, 220 West Broadway, San Diego, Ca 92101

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on November, 18, 1988 at San Diego, California.

/s/_____
ALEXANDRA M. KWOKA

LOS ANGELES TIMES
PART II/Sunday, October 7, 1984

COMMANDER ACQUITTED OF DRUNKENNESS

But Navy Judge Finds Him Negligent in Warship Accident

By DAVID FREED, Times Staff Writer

After five days of testimony and nearly 40 witnesses, a Navy judge on Saturday acquitted Cmdr. Willard G. (Bud) Chrisman of charges that he was drunk when an aging San Diego-based warship went aground in Hawaii on Jan. 24.

But Capt. Joseph M. Battaglino found Chrisman, 42, guilty of "negligently hazarding" the amphibious assault ship Thomaston during the grounding, and ordered that a letter of reprimand be placed in his career file.

"Your actions amounted to negligence and not a mere error in judgment," Battaglino told Chrisman.

Chrisman's conviction at general court-martial is believed to be the first in at least five years involving a ship captain

of the Navy Pacific Fleet.

20-Year Veteran

A decorated 20-year veteran, Chrisman appeared stoic and remained silent as the verdict was read. He declined to comment afterward. His attorney said Chrisman intends to appeal the decision.

Although the sentence is relatively light, it could stifle any chance Chrisman had of being promoted.

"It would be highly unlikely that he will ever again command a ship," said Chrisman's former executive officer, Cmdr. Michael Loessin, who testified on his behalf.

During his court-martial, Chrisman admitted that he had drunk four beers on the day of the grounding but insisted that he was not impaired as he attempted to steer the ship out of harm's way. Crewmen testified that he appeared drunk as he came aboard the Thomaston after liberty that day. Chrisman attributed his unusual appearance and behavior that night to food poisoning.

Battaglino said Saturday that there was

insufficient evidence to prove "beyond a reasonable doubt " that Chrisman was guilty of the other allegations against him. The Navy charged him with 13 counts of violating the Uniform Code of Military Justice. The allegations included being drunk while on duty, incapacitating himself for duty, negligently damaging government property and negligently hazarding a vessel by operating the ship in an unsafe condition. Other charges included dereliction of duty by failing to accurately report damage sustained during the grounding and knowingly releasing an official Navy message containing false information regarding one of the ship's landing craft, which also was damaged in the grounding.

Opinions of Verdict Vary

Chrisman's lawyer, Lt. Cmdr. Jeffrey H. Bogart, condemned the Navy's attempts to convict Chrisman.

"If I were to characterize the goverment's approach, it would be to level a shotgun at Cmdr. Chrisman, hoping something

would stick," Bogart said.

Lt. David L. Abney, the Navy lawyer who prosecuted the case, said he is pleased with the verdict. "I was happy to get (Chrisman) on anything," Abney said afterward. "The Navy doesn't need the type of behavior that Chrisman was accused of."

The Navy preferred charges against Chrisman after The Times in May reported officers' allegations that he was drinking on the day of the incident.

The grounding occurred at Port Allen on Kauai as the ship prepared to get under way for Pearl Harbor. Witnesses said Chrisman failed to attend a navigational briefing on board that night - the first time he had missed such a meeting - and was found afterward passed out in his cabin. The cabin, according to one enlisted man, reeked of alcohol and vomit.

'Twist' Ordered

Chrisman arrived on the Thomaston's bridge as the ship backed out of the harbor into strong winds. As the ship began drift-

ing toward shoal water, Chrisman took direct command and ordered a "twist," a maneuver in which a ship's two massive propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movement.

The Thomaston continued to drift toward shoal water for about 15 minutes, but Chrisman, witnesses said, attempted no other evasive action. Eventually, it scraped an uncharted reef. No one was injured in the incident, but later inspection showed at least $280,000 damage to the ship.

"To try a twist for five minutes is fine and dandy," Abney said Saturday in his closing argument. "But to have continued it for 15 minutes when it clearly wasn't working is ridiculous. That's where the negligence occurred. To put it in more mundane terms, he's already run the stop sign. . . He could have saved the ship from any damage at all had his judgment not been impaired. Either because of intoxi-

ication or just plain negligent seamanship, he let his ship run aground."

Chrisman's defense keyed upon the assertion that as he tried to maneuver the 510-foot ship, an errant 3/8-inch metal nut became lodged in one of its two main engines. Crewmen were forced to kill the engine when full power was needed to avoid the shoals.

Had that mechanical "act of God" not occurred at a crucial moment, the Thomaston might not have gone aground, Chrisman's attorney said. The ship's engineers, however, testified that the propeller shaft stopped turning only after the hull struck the reef.

LOS ANGELES TIMES
Part II/Saturday, October 6, 1984

SKIPPER DENIES GOING AGROUND WHILE DRUNK

By DAVID FREED, Times Staff Writer

Cmdr. Willard G. (Bud) Chrisman testified at his general court-martial Friday that he drank four beers on the day his ship went aground in Hawaii, but he denied that he was intoxicated or mentally impaired when the accident occurred.

Chrisman's admission, as well as his insistence that mechanical difficulties contributed in large measure to the Jan. 24 grounding at Port Allen on Kauai, came as the defense rested its case in the weeklong trial.

Navy Judge Joseph M. Battaglino is expected to hear closing arguments this morning. He may issue a verdict immediately afterward.

Chrisman has pleaded innocent to all 13 of the Navy's charges against him stemming from the grounding of his San Diego-based

vessel, the amphibious assault ship Thomaston. No one was injured in the incident, but at least $280,000 in damage was done to the 30-year old ship, which the Navy decommissioned last week.

Composed and soft-spoken, Chrisman, 42, spent slightly more than an hour testifying Friday afternoon, the first time he has publicly described his version of what happened Jan. 24.

Chrisman said he had gotten little sleep the night before and began the day of the grounding with an eight-mile run. At about noon, he went ashore with a group of civilian guests. He said he drank a beer on the pier at Port Allen while explaining the ship's loading capabilities, and then went sightseeing with the civilians.

During the afternoon, he had two more beers, he said. At dinner, he ordered a fish dish - mahi mahi - and another beer, neither of which he finished, he said. Chrisman said he lost his appetite

midway through the meal because, he said, the mahi mahi had "too strong a fish taste."

On the way back to the Thomaston at about 6:45 p.m., Chrisman began to feel sick, he said.

Some crewmen have testified Chrisman appeared intoxicated and had alcohol on his breath when he returned to the ship that night. Others have insisted that their abrupt and demanding skipper seemed normal, although unusually subdued.

Chrisman has maintained that he was overcome by severe food poisoning caused by the fish he ate for dinner.

He said that as soon as he reached his cabin aboard the Thomaston, he threw off his clothes and began to vomit. "I've got a weak stomach anyway from motion sickness," Chrisman testified, "I get seasick."

When asked Friday by his attorney, Lt. Cmdr. Jeffrey H. Bogart, whether he was drunk that day, Chrisman's response was sure but barely audible.

"No, I was not at any time," he said.

Chrisman's executive officer, Cmdr. Michael Loessin, testified Friday that as the Thomaston prepared to get under way Jan. 24 to Pearl Harbor, he suspected that Chrisman was drunk. However, Loessin said he was later convinced otherwise by the competent manner in which Chrisman handled himself as the ship left Port Allen.

Loessin said he had scheduled a navigational briefing to discuss with Chrisman and ship's officers the procedures that would be used to maneuver the Thomaston out of Port Allen. That task, all had agreed earlier, might be tricky because of the port's narrow dimensions and abundant shoals.

Chrisman, however, did not attend the briefing - the first time he had ever been absent at such a gathering, Loessin testified. After delaying the briefing for more than an hour, Loessin went to Chrisman's cabin and found Chrisman

rocking back and forth, "holding on to his stomach. He looked sick and told me to take the briefing."

Loessin then called a closed-door meeting with other officers aboard the ship.

"I told them that the captain would not be much help to us tonight, that we all had to do our jobs," Loessin said. "I indicated . . . to the department heads that the captain was intoxicated . . . I was deeply and sincerely worried about the captain's condition."

Loessin testified that only after he summoned him three times did Chrisman come to the Thomaston's bridge to direct the departure from Port Allen. Once he arrived, Chrisman seemed lucid and under control, although his efforts in preventing a grounding proved unsuccessful, Loessin said.

"Damage to the ship could have been more severe had Commander Chrisman not been on the bridge that night," Loessin said.

As a strong wind drifted the Thomaston toward shallow water on Jan. 24, Chrisman attempted to "twist" the Thomaston, a maneuver in which the ship's two giant propellers are revved in opposite directions so that the vessel pivots with little forward or backward movement.

Despite Chrisman's efforts, the ship continued to drift and eventually scraped atop a reef, where it remained for about 10 minutes until it maneuvered free with help from a tugboat.

Chrisman argued Friday that as he tried to maneuver the 510-foot long Thomaston out of harm's way, an errant three-eights-inch metal nut lodged itself in one of the ship's main engines, causing one of the Thomaston's propeller shafts to stop turning.

Had mechanical failure not occurred at that crucial moment, the Thomaston might not have gone aground, Chrisman said.

Ship's engineers, however, have

testified that the propeller shaft stopped turning only after the Thomaston's hull struck the reef.

LOS ANGELES TIMES
Part II/Friday, October 5, 1984

DRAMA LOW-KEYED AT COURT-MARTIAL

Navy Skipper Being Tried Without Any Military Pomp

By DAVID FREED, Times Staff Writer

Looking out the windows of the room where his general court-martial is taking place this week, Cmdr. Willard G. (Bud) Chrisman has been afforded an ominous view: a 10-foot-high chain-link fence topped by tightly coiled barbed wire.

The fence surrounds the brig at the San Diego Naval Base, and perhaps serves as a reminder of the criminal charges Chrisman is facing.

But if Chrisman, 42, is worried about landing behind bars, he doesn't show it. Facing a possible 13 years' imprisonment on charges that he was drunk when his ship went aground in January, he appears outwardly calm, and even-humored at his trial.

He may have reason.

The defense opened its case Thursday by introducing several witnesses who testified that Chrisman didn't appear to be drunk on the dark and stormy night of Jan. 24 when his aging amphibious assault ship, the Thomaston, struck an uncharted reef in Hawaii.

Chrisman pleaded innocent to all charges against him, maintaining that while he had drunk "in moderation," he was stricken with food poisoning on the day of the grounding.

Navy prosecutors this week presented their own witnesses who contend that Chrisman, an intense, 20-year Navy veteran, displayed classic signs of intoxication before the accident and later attempted to cover up the surrounding circumstances.

The court-martial, which enters its fourth day today, has offered the public a relatively rare look at Navy justice in action.

The trial has proven to be more Perry Mason than Caine Mutiny.

Except for the white uniforms, the proceedings could easily be mistaken for a civilian hearing. The courtroom, although small, certainly is not Spartan by military standards. There is carpet on the floor; simulated leather covers the padded chairs.

Capt. Joseph M. Battaglino, a burly military judge with a linebacker's walk and a patient air, presides over the court-martial. He wears his reading glasses low on his nose and seems almost embarrassed when directing those present to sit after he has taken the bench.

He says with a smile that he does not like long lunch breaks. A 10-minute recess at noon is not uncommon in his court.

There is the Navy's young prosecutor, Lt. David L. Abney, a soft-spoken yet assertive lawyer constantly tucking in his back shirttail, which billows out each time he stands.

His youthful assistant prosecutor,

Ensign Linda E. Fitzgerald, a recent University of San Diego law school graduate, is so new to the judiciary that she has yet to receive the results of her California bar examination.

On the first day of Chrisman's trial, Fitzgerald's beaming mother was the only civilian present aside from members of the media.

"With the money my parents paid for my education, my mother just wanted to make sure they got their money's worth," Fitzgerald explained.

There is Chrisman's lanky, bespectacled defense attorney, Lt. Cmdr. Jeffrey H. Bogart, an astute questioner whose objections to Abney's tactics are more often sustained by Battaglino than they are overruled.

And then there is Chrisman.

Described by prosecution witnesses as being an often abrupt and curt commander, Chrisman displays the same bearing in court, refusing to answer or even acknow-

ledge the presence of reporters. When he was asked Tuesday if he would consent to having his photograph taken, Chrisman said nothing as he kept his back turned.

"You guys always get the wrong side anyway," said his lawyer.

LOS ANGELES TIMES
Part II/Thursday, October 4, 1984

BOSUN SAYS CHRISMAN TOLD HIM TO "SHUT UP" ABOUT SHIP GROUNDING

By DAVID FREED, Times Staff Writer

Several days after his ship went aground in Hawaii, Capt. Willard G. (Bud) Chrisman admonished a crewman to "shut up and not spread around" word of the accident, the sailor testified Wednesday as Chrisman's general court-martial entered its second day.

Chief Petty Officer Robert L. Heersema's sworn statement bolstered the Navy's assertion that Chrisman, accused of being drunk when the grounding occurred Jan. 24, attempted to hide from his superiors the true circumstances surrounding the incident.

Officers testified Wednesday that Chrisman assured them after the grounding that his friend, a fellow officer, was to investigate the incident and that no one was going to be found culpable.

The prosecution has contended that Chrisman was impaired by alcohol consumed while ashore on the day of the grounding, and that his command decisions leading to the accident were plodding, ill-thought and reckless.

Through his lawyer, Chrisman has admitted that he drank "in moderation" that day, but has maintained that he was suffering from severe food poisoning when his vessel, the dock landing ship (LSD) Thomaston, apparently struck an uncharted coral reef.

Chrisman, 42, has pleaded innocent to a total of 13 counts, including allegations of dereliction of duty and incapacitating himself for duty. He faces dismissal from the Navy and 13 years' hard labor if convicted on all charges.

Heersema, a 20-year Navy veteran who was the Thomaston's bosun, testified Wednesday that as the ship backed out of Port Allen, Kauai, he was in radio communication with the bridge and, indirectly

with Chrisman.

Heersema said he warned repeatedly that heavy winds were causing the San Diego based vessel to drift toward shoal water, but he apparently was ignored.

Chrisman, according to prosecution witnesses, apparently was bent on "twisting" the Thomaston, a maneuver in which the ship's two propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movement. Despite the maneuver, the 510-foot ship continued toward shallow water.

"During that time period we were drifting to port, I noticed a scraping and bouncing," Heersema told Capt. Joseph M. Battaglino, the Navy Judge presiding over Chrisman's court-martial. "I reported it two or three times until I was told to belay my reports . . . Then the bridge told me to stand by to drop anchor. I told them we didn't need to, we were already aground."

While the ship was aground, Heersema

measured the depth of the water and found it to be 15 feet, he said. (The Thomaston's hull draws approximately 17 to 19 feet.) By reversing power and with help from a tugboat, the ship eventually was able to free itself and steam to Pearl Harbor.

Those on the bridge at the time said the usually authoritative Chrisman seemed strangely quiet during the incident at Port Allen. Petty Officer Eugene J. Crawford said he smelled alcohol on Chrisman's breath, but didn't notice any behavior associated with intoxication.

"It smelled, but it didn't reek," Crawford testified.

After the Thomaston limped to Pearl Harbor with an inoperable port propeller, word spread through the ship that the Navy was going to investigate the damage. Capt. Nigel E. Parkhurst, chief staff officer of the Thomaston's squadron and an acquaintance of Chrisman's, was assigned to head the probe.

Parkhurst eventually came aboard the

Thomaston, but Heersema said Wednesday that he never spoke to Parkhurst. Lt. David L. Abney, a Navy attorney who is prosecuting Chrisman's case, asked why.

"Didn't (Chrisman) tell you to 'shut up and not spread around what had happened?'" Abney demanded of Heersema.

"Yes, sir," Heersema responded.

Parkhurst's final report on the grounding, issued Feb. 22, made no mention of alcohol and recommended no punitive action against Chrisman.

"The commanding officer both erred in judgment in regard to his ability to twist the ship into the wind, and displayed outstanding judgment in the midst of crisis by backing the port engine . . ." Parkhurst wrote. "Placing the ship hard aground was thus avoided."

Officers aboard the Thomaston later contacted The Times expressing outrage that the navy's investigation had not been more thorough. After their allegations were reported in May, the navy renewed

its probe of the grounding and announced plans in August to court-martial Chrisman.

During testimony Wednesday, one of the Navy's foremost authorities on amphibious assault ships, Cmdr. Anthony Coulapides, questioned Chrisman's tactics on the night of the grounding. Coulapides, who has spent 39 years in the Navy, said that, in many ways, Chrisman's actions on the night of the grounding weren't those of a "reasonable and prudent" skipper.

Coulapides said: "Something else should have been done, and it wasn't."

LOS ANGELES TIMES
Wednesday, October 3, 1984

DRUNKENNESS DENIED BY NAVY SKIPPER

Chrisman Says He Had Food Poisoning When Ship Ran Aground

By DAVID FREED, Times Staff Writer

A U.S. Navy ship's captain accused of being intoxicated when his San Diego-based vessel ran aground on a Hawaiian reef in January was not drunk, but was instead suffering from "violent food poisoning", his attorney contended Tuesday during opening statements at the officer's general court-martial.

Cmdr. Willard G. (Bud) Chrisman, skipper of the amphibious assault ship Thomaston, pleaded innocent to all of the Navy's charges against him. Chrisman was depicted by his attorney as a man of great personal control who has been maligned by vindictive subordinates perhaps resentful of his intense discipline.

Food Poisoning Disputed

Prosecutors Lt. David L. Abney and Ensign Linda E. Fitzgerald began their

case Tuesday morning by presenting seven officers and crew members who testified that Chrisman exhibited various signs of intoxication before and after the Jan. 24 grounding in Port Allen, Kauai.

Among the most damaging testimony Tuesday was that of Dr. Richard C. Straube, a UC San Diego assistant professor of pediatrics and an expert on food poisoning. Straube said that from his research of the case, Chrisman displayed none of the classic signs of food poisoning.

"From the information I've seen, the most consistent diagnosis would be acute alcoholic intoxication," Straube said.

Chrisman went ashore with a group of civilian guests on the day of the grounding. He visited at least three restaurants and resorts on the island before returning later to his ship, according to testimony.

One of those guests, La Jolla attorney and former Navy officer Wendell Moats, said he saw Chrisman consume only one beer at lunch but admitted that he did

not observe Chrisman throughout the day.

Lt. Andrew L. Kilgore, the Thomaston's officer of the deck that night, testified that he watched as Chrisman came aboard about 7:50 p.m. Chrisman, he said, walked up the prow slowly. Chrisman's steps were heavy and he often leaned on the railing for support, Kilgore said.

Slept Through Briefing

Later, as the Thomaston prepared to steam toward Pearl Harbor, officers went to his cabin to summon him to a routine navigational briefing on the bridge. Despite their efforts to wake him, Chrisman, usually a light sleeper, failed to stir, officers testified.

It was the first time Chrisman had missed such a briefing since assuming command of the Thomaston in 1982, officers said.

An enlisted man, Seaman Harold Meeuwes, said he went into Chrisman's cabin to deliver a glass of tomato juice and found Chrisman huddled in his bunk. His clothes

were thrown on the deck, his trash can was filled with vomit and the cabin reeked of alcohol, Meeuwes said.

Soon after the ship got under way, a strong wind threatened to push the Thomaston toward shoal water. Chrismar, who by then had walked to the bridge and assumed direct command of the vessel's movements, attempted to "twist" the Thomaston - a maneuver in which the ship's two propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movement.

The maneuver, however, did little apparent good, and the Thomaston apparently drifted aground on an uncharted reef. The coral ripped open the ship's 510-foot hull in several places and badly damaged one of its 12-foot propellers.

At least $280,000 damage was done.

Defense attorney Bogart is expected to argue that the grounding may have been unavoidable because of a mechanical failure that night that caused one of the ship's

two massive propeller shafts to lock in place.

'Not Exactly . . . Mr. Chips'

"He is not exactly a Mr. Chips figure," said Chrisman's lawyer, Lt. Cmdr. Jeffrey H. Bogart. "He is a demanding person: demanding of himself and those who work for him. This was an old ship with problems. (Chrisman) was sent to that ship to correct those problems, and he proceeded to do so."

Bogart conceded that Chrisman, 42, had been drinking alcohol on the day of the grounding. However, Chrisman was incapacitated by tainted fish that he had eaten while ashore a few hours before, Bogart said.

"He is accused of being falling down drunk," said Bogart. "That just wasn't so. Commander Chrisman, if nothing else, is a person of moderation . . . a superbly conditioned athlete who long ago made a commitment not to abuse himself."

Chrisman on Tuesday waived his right

to have his case heard by a board of senior officers. Instead, a Navy Judge, Capt. Joseph M. Battaglino, alone will determine Chrisman's fate.

Testimony is expected to continue throughout the week at the San Diego Naval Base. As many as 40 witnesses may be summoned.

Bogart's portrayal of the intense, rail-thin Chrisman was in stark contract to that offered Tuesday by naval prosecution attorneys, who hope to send Chrisman to prison on charges that he recklessly endangered his aging warship.

Chrisman's court-martial began less than a week after the 30-year-old Thomaston, the oldest of the Navy's amphibious ships, was mothballed.

A 20-year Navy veteran with an unblemished record, Chrisman has been accused in 13 specifications of violating six articles of the Uniform Code of Military Justice. The allegations include being drunk while on duty, incapacitating himself

while on duty, negligently damaging government property, and negligently hazarding a vessel by knowingly operating his ship in an unsafe condition.

Other charges include dereliction of duty by failing to accurately report damage sustained during the grounding and knowingly releasing an official Navy radio message containing false information regarding one of the Thomaston's landing craft, which also was damaged as a result of the grounding.

Chrisman was relieved of his command in June, after the Navy renewed its investigation of the grounding following allegations of intoxication raised by The Times in May.

He faces dismissal from the Navy and 13 years' confinement at hard labor if convicted on all counts.

"The offenses charged in this case are particularly serious, and the evidence of wrongdoing seems clear and abundant . . .," Navy prosecutors wrote in their

pre-trial motions. "No reasonable person could doubt that trial by general court-martial was not only warranted but impelled."

LOS ANGELES TIMES
August 29, 1984

OFFICER TO BE TRIED IN IN WARSHIP GROUNDING

By DAVID FREED, Times Staff Writer

SAN DIEGO - The commander of a U.S. Navy warship based here will be court-martialed on charges that he was drunk when his aging, 13,000-ton vessel ran aground in January, a Navy spokesman said Tuesday.

Cmdr. Willard G. (Bud) Chrisman, skipper of the amphibious assault ship Thomaston, faces dismissal from the Navy and 13 years confinement at hard labor if convicted on all counts.

Chrisman, 42, was relieved of his command in June and assigned to shore duty in Japan after the Navy initiated a formal investigation into the grounding, which occurred in Hawaii. He has since been transferred to a desk job in San Diego, according to Cmdr. Ron Morse, a Navy Spokesman in San Diego.

Morse said the decision to court-martial Chrisman was made Friday by Vice Adm. Harry C. Schrader, Jr., commander of the Navy's surface forces in the Pacific, after he examined the findings of a full-scale investigation of the grounding. Schrader ordered the investigation after The Times in May, reported allegations that Chrisman was drunk when the grounding occurred.

Chrisman was not punished after the Navy's initial review of the incident, which made no mention of alcohol.

Morse said Tuesday that grounding-related repairs to the Navy cost about $280,000. However, copies of work orders obtained by The Times indicate that at least $465,000 in repairs was authorized. They were completed in May at Subic Bay, the Philippines.

A native of Port Arthur, Tex., and a University if Missouri graduate, Chrisman has spent more than 20 years in the Navy. He served aboard a destroyer as a weapons

officer, attended the Armed Forces Staff College and spent two years in a foreign liaison position with the Defense Intelligence Agency before assuming command of the Thomaston in 1982.

Soon after the ship got under way, a strong wind threatened to push the Thomaston toward shallow water. Chrisman, who by then had assumed direct command of the vessel's movements, attempted to "twist" the Thomaston - a maneuver in which the ship's two propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movement.

The maneuver, however, did little apparent good and Chrisman seemed unwilling to attempt any other evasive action. The Thomaston, with more than 300 crewmen aboard, drifted aground on an unchartered reef. The coral ripped open the 510-foot vessel's flat hull in several places and badly damaged on of its 12-foot propellers.

Tentative repairs were made at Pearl

Harbor and the Thomaston soon afterward set course for Okinawa. At sea, however, grounding-related damage that went undetected at Pearl Harbor caused the Thomaston to take on water. The flooding, in turn, caused a 110-foot landing craft to break free from its lashings and careen about.

Officers have accused Chrisman of attempting to cover up the flooding by telling superiors that the Thomaston's ballast valves needed replacing.

Morse said Tuesday that grounding-related repairs cost the Navy about $280,000. However, copies of the work orders obtained by The Times indicate that at least $465,000 in repairs were authorized. Those repairs were completed in May at Subic Bay in the Philippines.

The last court-martial of a Navy ship's captain is believed to have occurred in 1983, when Cmdr. Gerald M. Vanderwier, 42, skipper of the Florida-based frigate Edward McDonnell, was accused of engaging in homosexual relations with an enlisted man.

Vanderwier was found guilty in December on three counts of sodomy. He was dismissed from the Navy and ordered to forfeit $1,200.

Vanderwier has appealed his conviction.

Like Vanderwier, Chrisman enjoyed a distinguished service career until allegations against him surfaced.

A Native of Port Arthur, Tex., and a University of Missouri graduate, Chrisman has spent more than 20 years in the Navy. He served aboard a destroyer as a weapons officer, attended the Armed Forces Staff College and spent two years in a foreign liaison position with the Defense Intelligence Agency before assuming command of the Thomaston in 1982.

LOS ANGELES TIMES
June 22, 1984

NAVY BEACHES SKIPPER WHO RAN SHIP ON REEF IN HAWAII

By DAVID FREED, Times Staff Writer

The captain of a U.S. Navy warship that has its home port in San Diego was relieved of his command Thursday and faces 10 counts of violating military regulations amid allegations that he was intoxicated when his vessel ran aground in Hawaii.

Cmdr. Willard G. (Bud) Chrisman, 42, captain of the amphibious assault ship Thomaston, has been reassigned to shore duty in Japan pending outcome of a formal investigation of the grounding according to Cmdr. Ron Morse, a Navy spokesman in San Diego.

A 20-year Navy veteran with a distinguished career, Chrisman faces possible court-martial or dismissal from the service if the allegations against him are proven. The decision to relieve Chrisman and prefer

charges was made by Vice Adm. Harry C. Schrader, Jr. commander of the Navy's surface forces in the Pacific.

"Because of pending charges and the possibility of future disciplinary action, Schrader determined that Chrisman could no longer act effectively as commanding officer of a combatant ship." Morse said.

The decision to relieve Chrisman was regarded as rare.

In the past two years only one other captain in the Navy's 167-ship Pacific surface fleet has been relieved of his command, Morse said. That captain, the skipper of a mind sweeper, was never charged with misconduct, but was sent to a rehabilitation center for treatment of alcoholism because of "behavioral problems he was having at the time."

Costly Damages

The Navy has so far been billed $46,046 in repair costs because of the Thomaston accident, Morse said. However, a partial

set of work orders obtained by The Times shows that at least $465,000 in repairs were ordered after the grounding. Experienced officers with knowledge of the Thomaston's hull damage estimated repair costs would exceed $1 million.

Repairs were completed on May 8 in the Philippines even though the Thomaston, the oldest of 65 amphibious warships now in active U.S. service, is due to be mothballed in September. The ship is now in Yokosuka, Japan.

Several Thomaston officers contacted The Times in May, expressing outrage that the Navy had not conducted a more thorough investigation of the grounding. They also were critical that Chrisman had not been disciplined.

The Navy reopened its investigation after The Times published the officers' allegations to in a story on May 20. At about the same time, Navy officials received an anonymous telephone call that also

detailed problems aboard the ship, Morse said.

The Chrisman's commanders are formally investigating possible violations of four sections of the Uniform Code of Military Justice, Morse said. Ten counts are involved, but Morse said he was unsure of which justice code section applied to each count.

The four violations of which Chrisman is accused are failure to obey a lawful general order and dereliction of duty; damaging government property; hazarding a vessel; and incapacitating himself for duty.

"The last charge relates to excessive consumption of alcoholic beverages, but it should be noted that Chrisman has not been accused of drinking aboard ship." Morse said.

The present investigation is similar to a civilian grand jury. If there can be found sufficient evidence for prosecution, Chrisman will either be court-martialed,

dismissed or simply reprimanded, Morse said. If he is exonerated, Chrisman's next assignment would be decided by a naval screening board. It is unlikely he would return to the Thomaston, which he has commanded since 1982.

Officers staioned on the 510-foot Thomaston said Chrisman went ashore Jan. 24 at Port Allen, Kauai, with a group of civilians. That evening, as the ship and its 310-man crew prepared to leave for Pearl Harbor, sailors went below deck to summon Chrisman to the bridge so that he could direct the departure from Port Allen's narrow harbor.

The officers alleged that Chrisman was found sprawled on his cabin bunk. They said he had been vomiting and appeared drunk. As he walked to the bridge, Chrisman seemed to stagger and his voice was hoarse, they said.

Soon after the ship got under way, a strong, steady wind threatened to push

the Thomaston toward shallow water, the officers claim, and Chrisman, who by then had assumed direct command of the vessel's movements, attempted to "twist" the Thomaston - a maneuver in which the ship's two propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movement.

The maneuver, however, did little apparent good, and the Thomaston drifted aground on an uncharted reef. The vessel's flat hull was ripped open in several places and one of its 12-foot propellers was badly damaged.

The Navy's preliminary investigation of the incident, conducted by the chief staff officer of Chrisman's squadron, made no mention of alcohol. Chrisman, according to officers, was issued a letter by superiors that merely admonished him for being "inflexible" in his efforts to prevent the Thomaston from going aground. The letter was not placed in Chrisman's career file.

Morse said he did not know how long the present investigation involving Chrisman would take, but vowed that "it will be comprehensive."

Capt. J. P. Kelly, who had been assigned to another naval vessel, was named new skipper of the Thomaston, Morse said.

May 20, 1984
LOS ANGELES TIMES

NAVY OFFICERS SAY DRUNK CAPTAIN CAUSED GROUNDING

By DAVID FREED, Times Staff Writer

A U.S.Navy warship based in San Diego recently spent two weeks in dry dock undergoing repair after its captian became intoxicated and failed to prevent the vessel from running aground, ship's officers have alleged.

Naval authorities said they have launched a formal investigation into allegations involving the docklanding ship Thomaston, which ran aground Jan. 24 in Hawaii.

Cmdr. Ron Morse, a Navy spokesman in San Diego, said claims that the Thomaston's, captain had been drinking are "being taken seriously but we have no information

at this point that the charge is true. Needless to say, it would be extremely uncharacteristic for a commanding officer to do this."

Morse declined to discuss specific aspects of the Navy's investigation, which he said could take six months or longer.

The Navy has so far been billed $46,036 for repairs as a result of the Thomaston's accident. Morse said. However, a partial set of work orders obtained by The Times shows that at least $465,000 in repairs were recommended after the grounding. Experienced officers with knowledge of the Thomaston's hull damage estimated the final cost of the repairs could exceed $1 million.

Repairs were completed on May 8 in the Philippines even though the Thomaston, the oldest of 65 amphibious warships currently in active U.S. service, is due to be mothballed in September.

Several Thomaston officers contacted The Times by telephone last week, expressing outrage that the Navy's preliminary inbestigation of the grounding had not been conducted more intently. They also were critical that the ship's captain, Cmdr. Willard G. (Bud) Chrisman, had not been disciplined.

"He endangered 310 lives by his actions, and you just can't let something like that slide," said one officer. "Thirty or 40 people on this ship saw him that night. It was a disgrace."

Chrisman reportedly was issued a non--punitive "letter of caution" shortly after the grounding. However, a Navy official who conducted a preliminary inquiry was not told during his investigation about the contention that Chrisman had been drinking before the incident. Ship's personnel said they didn't come forward at the time because they feared retaliation.

The Times brought the officers' alle-

gation to the Navy, which then re-opened its investigation. Chrisman could lose his command and face disciplinary action if the allegation of drinking while on duty prove true.

Extensive Sea Duty

A 20-year Navy veteran, Chrisman, 42, has a distinguished service record that includes txtensive sea duty aboard other warships. He served two years in a foreign liaison position with the Defense Intelligence Agency before assuning command of the Thomaston in 1982.

He declined to speak with a Times reporter, on advice from the Navy.

Ship's personnel agreed to discuss the Jan. 24 incident on condition they not be identified. This is what they contend:

The Thomaston left San Diego on Jan. 17 bound for the Hawaiian Islands with 310 crew members and approximately 250 Marines aboard. The ship arrived a week later at

Port Allen on Kauai, where the Marines debarked.

On the morning that the 510-foot Thomaston docked in tiny Port Allen, Chrisman assembled the entire crew except for those on watch. He informed them that they were free to leave the ship, but were to return that afternoon, when the Thomaston was to head for Pearl Harbor.

Chrisman left the ship about 11 a.m. accompanied by three of nine civilian Navy guests who had sailed from California to Hawaii avoard the Thomaston. The guests accompanying Chrisman wher Claude Schonert of Cathedral City, a contractor whose wife attended high school in Costa Mesa with Chrisman's wife; Schonert's father-in-law, Charles Pike of Anaheim, and John Ryan, a Catholic priest from the British Royal Navy.

Schonert told The Times that he, Chrisman, Pike and Ryan rented a car for the afternoon on Kauai. Schonert said they

went sightseeing and had dinner before returning to the ship.

"We had a few beers but it was nothing major," Schonert said. "I was driving and I can assure you I don't drink when I drive." Schonert said Chrisman was not intoxicated.

The Thomaston's officers had scheduled a navational briefing for about 5 pm. that day to discuss woth the captain the procedures that would be used to maneuver the vessel out of Port Allen. That task, all had agreed earlier, might be tricky because of the port's narrow dimensions and prominent shoals.

Found on Bunk

Chrisman, however, did not attend the 5 p.m. briefing. He had come aboard earlier and was reported to be asleep. As the ship prepared to depart later, two officers were dispatched to summon Chrisman to the bridge so that he might direct the departure.

Sources said Chrisman was found sprawled on his cabin bunk. He had been vomiting and appeared drunk.

As he walked to the bridge, Chrisman seemed to stagger and his voice was hoarse. After he arrived, the ship began backing away from the 600-foot pier to which it had been moored and made its way into the habor.

Just outside the harbor entrance a steady wind gusting 33 knots began to blow.

Chrisman decided to "lay to," or halt the ship's progerss until a harbor pilot--who had been placed aboard to help guide the Thomaston into open water-could debark. At the same time, Chrisman announced he was "taking the con," a Navy expression indicating he would assume direct control of the ship's movements.

In the strong wind, the Thomaston began to float toward shallow water. Chrisman ordered minor navigational changes as the ship continued to drift.

Chrisman attempted to "twist" the Thomaston, a maneuver in which the ship's two propellers are rotated in opposite directions so that the vessel pivots with little forward or backward movements.

A lookout stationed in the ship's forecastle began shouting out the shrinking number of yards between the Thomaston and the shore. Yet personnel who were on the bridge said Chrisman seemed only intent on trying to "twist" the ship as it moved ever closer to the beach.

Suddenly, at 10:28 p.m., the Thomaston shuddered and a loud metallic noise could be heard. The vessel had run aground on an uncharted reef, where it remained for an estimated 18 to 20 minutes.

Chrisman "was very, very calm; he was acting real slow," said one man who was on the bridge at the time.

"The captain was in a stupor," said another. "He obviously knew he was in trouble."

It took all of the ship's power-and a push from a civilian tugboat-to free the Thomaston.

"(Chrisman) wouldn't let his ship run agound," said Schonert, who admitted he was asleep when the incident occurred. "Let me tell you, that harbor was too small for that ship to begin with. He put a few nicks in the prop, that was all

The Thamaston limped at about half speed to Pearl Harbor, where divers reported finding a few scrapes on the hull and a badly damaged 12-foot propeller, one of two attached to the twin steam turbines that power the ship. A replacement propeller was ordered from the East Coast at an approximate cost of $46,000 and transported to Hawaii aboard a specially chartered U.S. Air Force jet.

While the propeller damage was plainly visible, Pearl Harbor divers apparently failed to discover what later inspections in Okinawa, Japan, and the Philippines

would reveal: a 10-foot-long, 4-inch-wide gash running down the center of the hull; a foot-square rip in another area; a smaller hole with chunks of coral protruding from it; torn structural beams, and indentations in at least eight hull sections.

Before the Thomaston left Pearl Harbor, naval officials prepared a routine report on the grounding, as they do on all such accidents. Capt. Nigel Parkhurst, chief staff officer of the Thomaston's squadron and himself a former dock landing ship commander, was assigned to conduct the inquiry.

As Parkhurst prepared to come aboard the Thomaston, Chrisman assembled his officers and chief petty officers.

"He told us that his friend, Captain Parkhurst, would be handling the investigation," said one officer who attended the meeting. "He said everything was going to be OK. After (Chrisman) told us that (Parkhurst) was his buddy, nobody in their

right mind would say the captain was drunk when we went aground. We thought the captain would admit it. But he didn't."

Based on Parkhurst's findings, which made no mention of alcohol, Chrisman's squadron commander issued a letter that gently admonished Chrisman for being "inflexible" in his efforts to stop the Thomaston from going agound. The letter was not placed in Chrisman's career records file.

As soon as its damaged propeller could be replaced, the Thomaston steamed into open water. But in relatively calm seas, the Thomaston began taking on water.

Aboard other warships, such an event would be of immediate concern. However, the Thomaston and other dock landing ships are designed to partially fill with water. During amphibious warfare operations, part of the ship called the 'well deck' is intentionally flooded. The process allows landing craft and other amphibious assault

vehicles carried aboard the Thomaston to be launched from her stern.

Flooding, Chaos

On this night, however, as more than four feet of seawater inadvertently filled the Thomaston, the flooding caused chaos, A 110-foot, 180-ton utility landing craft (LCU) broke free from its one-inch-thick wire lashings and began careening about the well deck.

The damaged LCU eventually was strapped down, but not before one crewman was nearly knocked overboard.

Word of the LCU incident soon made its way to the Thomaston's unit, Amphibious Squadron 5. Commanders requested an explanation. Chrisman's response suggested the Thomaston had been having problems with its ballast valves, and made no mention of the Port Allen grounding. Chrisman had earlier requested that five replacement valves be ordered at an estimated cost of $30,000.

"We didn't need (new ballast valves)

at all; everyone knew that at the time," said one officer. "The new valves were waiting for us at the dock when we got to Sasebo, Japan, but they were never even installed. It was just a cover-up so that we wouldn't have to talk about what happened in Hawaii."

It would be more that three weeks before the ship reached Okinawa. For the duration of the journey, at three-hour intervals, the crew had to operate ballast pumps to remove water from the well deck.

Holes Detected

After a brief stop at Okinawa, the Thomaston headed toward Korea and then Sasebo, Japan, the nearest available repair facility, where divers reported finding holes in the hull. Emergency repairs were made and the ship proceeded to the Navy's base in the Philippines.

The Thomaston went into dry dock at Subic Bay, the Philippines, on April 24, where it remained for two weeks. It later

steamed to Hong Kong, where it has been for the last week.

The ship is to remain in service until September, when it is scheduled to be retired in ceremonies in San Diego and then mothballed in San Francisco Bay.

Navy spokesman Morse defended the repairs as necessary even though the Thomaston is to be decommissioned.

"Were more concerned about what happens tomorrow than what happens four months from now," Morse said. "We may need that ship tomorrow."

(3)

No. 88-844

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WILLARD G. CHRISMAN,
Appellant,
VS.
THE TIMES MIRROR COMPANY,
Appellee.

On Appeal from The California Court of Appeal, Fourth Appellate District, Division One

MOTION OF APPELLEE THE TIMES MIRROR COMPANY TO DISMISS

Of Counsel:
LINDA L. BERGER
GIBSON, DUNN & CRUTCHER
600 "B" Street,
Suite 2300
San Diego, CA 92101
(619) 531-7000

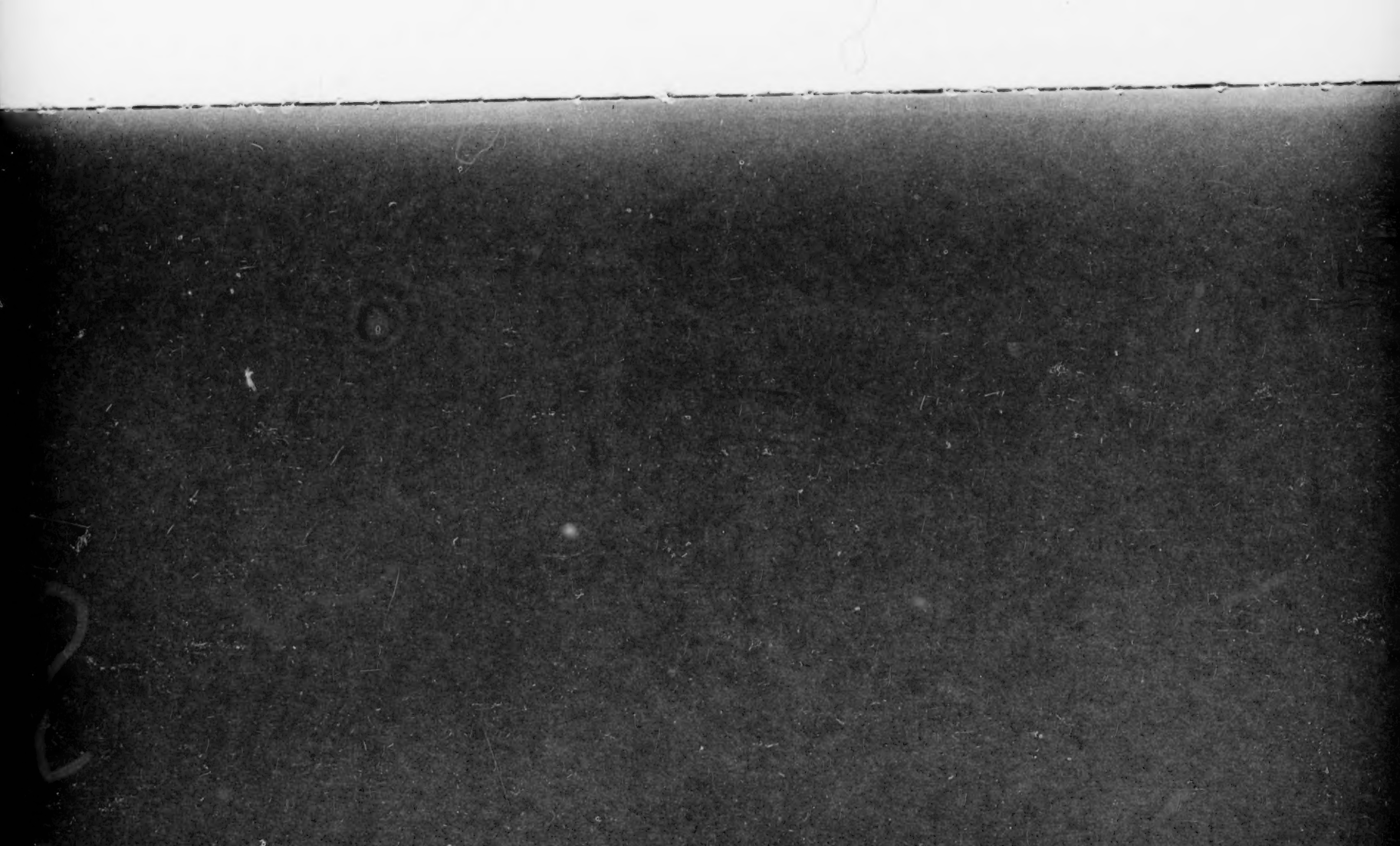
*REX S. HEINKE
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

WILLIAM A. NIESE
JEFFREY S. KLEIN
THE TIMES MIRROR COMPANY
220 WEST FIRST STREET
LOS ANGELES, CA 90053
(213) 237-3952

Attorneys for Appellee
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600



QUESTIONS PRESENTED

The questions presented by this motion to dismiss are:

1. Did the Court of Appeal decide any substantial federal questions which appellant properly raised there, so that this Court has jurisdiction under 28 U.S.C. § 1257(2) or (3) to review the decision of the Court of Appeal?

2. If the answer to the first question is affirmative, did the Court of Appeal uphold any California statute whose validity appellant properly drew into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, so that this Court has jurisdiction under 28 U.S.C. § 1257(2) to review the decision of the Court of Appeal?[1]

---

[1]28 U.S.C. § 1257 was amended June 27, 1988, to eliminate appeal jurisdiction of final judgments by state courts. This amendment was effective ninety days later, *i.e.*, on September 25, 1988, but did not affect the right to review or the manner of reviewing the judgment or decree of a state court which was entered before the effective date. The decision which appellant has asked this Court to review was filed on May 9, 1988; the California Supreme Court declined to review that decision on July 28, 1988.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
QUESTIONS PRESENTED	i
MOTION OF APPELLEE THE TIMES MIRROR COMPANY TO DISMISS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
I. THIS APPEAL IS NOT WITHIN THIS COURT'S CERTIORARI OR APPEAL JURISDICTION	7
A. As To California Civil Code § 48a, No Substantial Federal Questions Or Federal Challenges To Its Validity Were Properly Before The Court Of Appeal, So This Court Has No Jurisdiction	7
B. In Any Event, Appellant's Claims About Section 48a Would Not Constitute Grounds For An Appeal	10
C. As To California Civil Code § 47(4), Appellant Raised No Federal Questions Below About Application of California's Statutory Fair And True Report Privilege; Review Of the Court Of Appeal Decision Is Therefore Not Within The Jurisdiction Of This Court	12
D. Review Of The Court Of Appeal Decision On Causation Is Not Within The Jurisdiction Of This Court Because No Federal Questions About Causation Were Raised Below	14
II. APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE THE SOLDIERS' ACT HAS NO APPLICATION TO CALIFORNIA'S CORRECTION STATUTE	14

Table of Contents

	Page
III. APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE CALIFORNIA'S CORRECTION STATUTE IS CONSTITUTIONAL	18
CONCLUSION	22

TABLE OF AUTHORITIES

Cases

	Page
Abadjian v. Superior Court, 168 Cal.App.3d 363, 214 Cal.Rptr. 234 (1985)	8, 9
Arkless v. Kilstein, 61 F.Supp. 886 (E.D. Pa. 1944)	15, 17
Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978)	13
Barth-Wittmore Insurance v. H.R. Murphy Enterprises, Inc., 169 Cal.App.3d 124, 214 Cal.Rptr. 894 (1985)	8
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945)	10
Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902)	21
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	11, 12, 21
Interstate Circuit, Inc., v. City of Dallas, 390 U.S. 676 (1968)	5
John v. Paullin, 231 U.S. 583 (1913)	8
Keefe v. Spangenberg, 533 F.Supp. 49 (W.D. Okla. 1981)	17
Kulko v. Superior Court of California, 436 U.S. 84 (1978)	11
McCarty v. McCarty, 453 U.S. 210 (1981)	11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	12
Newman v. Newman, 234 Ga. 297, 216 S.E.2d 79 (1975)	17
Paul v. Davis, 424 U.S. 693 (1976)	21
People v. Kings County Development Co., 48 Cal.App. 72, 191 P. 1004 (1920)	16
Rebar v. Rebar, 165 Pa. Super. 341, 67 A.2d 598 (1949)	17
Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555 (1980)	10, 11, 12

Table of Authorities

Cases

	Page
Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960)	11
Schroeder v. Toedtemeier, 184 Or. 561, 200 P.2d 606 (1948)	17
Seid Pak Sing v. Barker, 122 Cal.App. 93, 10 P.2d 92 (1932)	17
Smith v. Pettijohn, 366 P.2d 633 (Okla. 1961)	17
Street v. New York, 394 U.S. 576 (1969)	6
Sturm, Ruger & Co. v. Superior Court, 164 Cal.App.3d 579, 210 Cal.Rptr. 573 (1985)	8
Thornley v. Superior Court, 89 Cal.App.2d 662, 201 P.2d 567 (1949)	17
Werner v. Southern California Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825 (1950), *appeal dismissed*, 340 U.S. 910 (1951)	18, 19, 20

Federal Statutes and Rules

28 U.S.C. § 1257 (West 1966 and West Supp. 1988)	i
28 U.S.C. § 1257(2) (West 1966 and West Supp. 1988)	i, 2, 7, 10
28 U.S.C. § 1257(3) (West 1966 and West Supp. 1988)	i, 2
28 U.S.C. § 2103 (West 1982)	7, 13
50 U.S.C.A. App. §§ 501 *et seq.* (West 1981)	*passim*
50 U.S.C.A. App. § 510 (West 1981)	15, 16
50 U.S.C.A. App. § 525 (West 1981)	16, 17, 18

TABLE OF AUTHORITIES

FEDERAL STATUTES AND RULES

	Page
Supreme Court Rules	
Rule 15.1(g)	6
Rule 16	1
Rule 17	13
Rule 21.1(h)	6
Rule 28.1	1
State Statutes and Rules	
California Civil Code	
Section 47(4) (Deering Supp. 1988)	3, 4, 5, 12, 13
Section 48a (Deering 1971)	*passim*
California Code of Civil Procedure	
Section 437c (Deering Supp. 1988)	3
Section 437c(f) (Deering Supp. 1988)	8
Section 437c(*l*) (Deering Supp. 1988)	8
Section 904.1, 904.4 (Deering Supp. 1988 and 1988 Cal. Adv. Legis. Serv. 789)	9
California Rules of Court	
Rule 2	4, 9
Rule 29	4
Rule 977	4
Other	
Advisory Committee Comment (1985), Cal. R. Ct. 28	5

No. 88-844

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

WILLARD G. CHRISMAN,
Appellant,

VS.

THE TIMES MIRROR COMPANY,
Appellee.

On Appeal from The California Court of Appeal, Fourth Appellate District, Division One

MOTION OF APPELLEE THE TIMES MIRROR COMPANY TO DISMISS

Pursuant to Supreme Court Rule 16, appellee The Times Mirror Company, d/b/a the Los Angeles Times ("Times Mirror"),* moves this Court for an order dismissing the appeal in this case from the decision of the California Court of Appeal for the Fourth Appellate District, Division One ("Court of Appeal"). The decision of the Court of Appeal was based solely on state law

*All parties to the proceedings below are named in the caption. Appellee The Times Mirror Company has an interest in the following subsidiaries and affiliates: Los Angeles Times-Washington Post News Service Inc., Smurfit Newsprint Corp., Graphic Controls Corp., and Tejon Ranch Company. Times Mirror has no other parent company, subsidiary (except wholly owned subsidiaries), or affiliate within the meaning of Supreme Court Rule 28.1

grounds. Appellant never properly raised in the Court of Appeal any substantial federal questions, the Court of Appeal decided no substantial federal questions, and this Court therefore has no jurisdiction under either 28 U.S.C. § 1257(2) or (3) to review the decision of the Court of Appeal.

Moreover, appellant cannot maintain an appeal under 28 U.S.C. § 1257(2) because the Court of Appeal did not uphold any California statute which appellant had properly challenged as being in conflict with federal law. This appeal should therefore be dismissed for lack of jurisdiction or for lack of a substantial federal question.

STATEMENT OF THE CASE

This libel action is based on seven articles published by Times Mirror between May 20, 1984, and October 7, 1984. The first article reported allegations that appellant, a naval commander, had been drunk when his ship ran aground in January, 1984. The second article, published August 29, 1984, reported that the Navy had decided to court-martial appellant on various charges related to the grounding. The third, fourth, fifth, sixth, and seventh articles reported on each day of appellant's court-martial, concluding with a report that appellant had been convicted of negligently hazarding his vessel but acquitted of all other charges. PA 1378-88.[2]

On July 25, 1986, Times Mirror brought a motion for summary judgment or summary adjudication of issues

---

[2]Appellant apparently requested the Court of Appeal to certify and transmit to this Court the record below. Times Mirror has been unable to determine whether that record has in fact been provided to this Court. Citations in this motion are to the Petitioner's Appendix ("PA") filed by Times Mirror in the Court of Appeal. That Appendix included the pleadings filed in the trial court.

pursuant to California Code of Civil Procedure § 437c. In that motion, Times Mirror contended, first, that appellant had not made a correction demand as required by California Civil Code § 48a for the first three articles, and therefore that he was limited to any special damages caused by those articles. Second, Times Mirror contended that it was not the legal cause of appellant's alleged special damages, and therefore appellant's causes of action based on Times Mirror's first three articles must be dismissed. Third, Times Mirror contended, that appellant's causes of action as to the last five articles — those reporting on the court-martial — must be dismissed because the articles were fair and true reports of his court-martial and therefore absolutely privileged under California Civil Code § 47(4).[3] PA 1310-1497.

The trial court, in an order filed on June 26, 1987, denied Times Mirror's motion for summary judgment but summarily adjudicated two issues in Times Mirror's favor. PA 8-11. Pursuant to California Civil Code § 48a, the trial court found that appellant had not made a correction demand for the first three articles, and that appellant was therefore limited to any special damages caused by those articles. PA 9. The trial court also found that appellant's court-martial was a judicial or other official proceeding within the meaning of California Civil Code § 47(4). PA 10.

Appellant never sought review of the trial court's decisions against him.

Times Mirror, however, sought review of the trial court's rejection of its contentions that it was not the legal cause of appellant's alleged special damages, and

---

[3]Times Mirror's motion for summary judgment advanced other grounds as well, but those grounds were not the basis for the decisions of the trial court nor of the Court of Appeal.

that its articles reporting on the court-martial were fair and true reports and therefore privileged under section 47(4). Times Mirror's Petition for Writs of Mandamus, Prohibition, and Review was filed with the Court of Appeal on July 10, 1987.

Initially, the Court of Appeal denied Times Mirror's writ petition without a hearing or an opinion, but the Supreme Court of California granted Times Mirror's Petition for Review and transferred the matter back to the Court of Appeal with directions to hear the matter. The Court of Appeal received briefs and then heard oral argument on February 9, 1988.

The Court of Appeal decision directing the trial court to enter summary judgment for Times Mirror was filed on May 9, 1988. The Court of Appeal denied appellant's Petition for Rehearing on May 26, 1988, and the Supreme Court of California denied appellant's Petition for Review on July 28, 1988. Pursuant to the Court of Appeal's decision, judgment was entered for Times Mirror on August 26, 1988. Written notice of entry of judgment was served on appellant by mail by Times Mirror on September 7, 1988. Appellant took no appeal from that judgment in the California courts, and the time to do so has expired. Cal. R. Ct. 2 (notice of appeal must be filed within sixty days after service of written notice of entry of judgment).

The unpublished decision of the Court of Appeal is contained in appellant's Appendix, at i. Under California law, an unpublished decision of a Court of Appeal has no precedential value and may not be cited as authority. Cal. R. Ct. 977. The order of the California Supreme Court denying review also is contained in appellant's Appendix, at iii. Review by the California Supreme Court of a Court of Appeal decision is discretionary. Cal. R. Ct. 29. Denial of review is not an expression of the opinion of the

California Supreme Court on the merits. Advisory Committee Comment (1985), Cal. R. Ct. 28.[4]

SUMMARY OF ARGUMENT

This appeal is from a decision of the Court of Appeal ordering summary judgment for Times Mirror on two grounds. First, the Court of Appeal decided, based solely on California law, that Times Mirror was not the legal cause of appellant's alleged special damages resulting from Times Mirror's first two articles,[5] and therefore appellant's causes of action based on those articles must be dismissed. Appellant's Appendix, at i. Second, the Court of Appeal decided, again based only on California law, that the statutory privilege provided by California Civil Code § 47(4) protected Times Mirror's last five articles, and therefore appellant's causes of action based on those articles must be dismissed. *Id.* These are solely state law issues.

Any review of the Court of Appeal decision will show that the Court of Appeal decided no federal questions

---

[4]Although appellant's Jurisdictional Statement is entitled "Appeal From the Judgment of the Court of Appeal," appellant repeatedly, but erroneously, states that the California Supreme Court upheld the constitutionality of the correction statute or unconstitutionally extended the neutral report privilege. See, *e.g.*, Jurisdictional Statement, at i-iii. The California Supreme Court did no such thing; it simply denied review. Appellant's appeal is from the Court of Appeal decision, not the California Supreme Court's discretionary denial of review. See, *e.g., Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

[5]Times Mirror's third article was encompassed both by the trial court's ruling that appellant was limited to his special damages and by the Court of Appeal decision that the articles on the court-martial were protected by the fair and true report privilege.

whatsoever. This demonstrates that no such questions were properly before the Court of Appeal:

> [When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969).

Appellant has the burden of showing that federal questions were raised below by specifying in his statement of the case "the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court."[6] Sup. Ct. R. 15.1(g); see also Sup. Ct. R. 21.1(h). Appellant has not and cannot meet this burden here. Because no substantial federal questions or federal challenges to the validity of a California statute were before the Court of Appeal, this appeal must be dismissed.

---

[6]To demonstrate that the arguments appellant advanced in the California courts are correctly described in this motion, Times Mirror is lodging concurrently with the filing of this motion copies of the appellant's Memorandum of Points and Authorities in Response to and in Opposition to Petition for Writs of Mandamus, Prohibition and Review, filed with the Court of Appeal July 24, 1987 ("Appellant's First Opposition"); appellant's Second Response of Real Party in Interest, filed with the Court of Appeal December 7, 1987 ("Appellant's Second Opposition"); and appellant's Petition for Review, filed with the California Supreme Court June 16, 1988 ("Appellant's Petition").

I.

THIS APPEAL IS NOT WITHIN THIS COURT'S CERTIORARI OR APPEAL JURISDICTION[7]

A. As To California Civil Code § 48a, No Substantial Federal Questions Or Federal Challenges To Its Validity Were Properly Before The Court Of Appeal, So This Court Has No Jurisdiction.

In this Court, appellant asserts two federal claims about California's correction statute. That statute, California Civil Code § 48a, limits a defamation plaintiff's recovery to his special damages unless he makes a timely correction demand. Cal. Civ. Code § 48a (Deering 1971).

Appellant first claims that section 48a should not have been applied to him because of the Soldiers' Act.[8] Jurisdictional Statement, at 34-35. Appellant raised this issue in the trial court, claiming that because of the Soldiers' Act, his correction demand letter, sent two and one-half years after Times Mirror's articles were published, was timely. PA 319-20. The trial court ruled that the Soldiers' Act did not relieve appellant from making a timely correction demand as to Times Mirror's first three articles. PA 25-29. The trial court then granted Times Mirror's motion for summary adjudication, holding that appellant was limited to his special damages, if any, pursuant to section 48a because he had never made the required correction demand. PA 9.

---

[7]Because this Court may treat appellant's papers as a petition for writ of certiorari (28 U.S.C. § 2103), Times Mirror will address the jurisdictional requirements under both 28 U.S.C. § 1257(2) and (3).

[8]The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. §§ 501 *et seq.* will be referred to as the "Soldiers' Act" for convenience.

Appellant never sought review in the California courts of this summary adjudication. California law is controlling on whether a federal question was properly preserved in the California courts. *John v. Paullin,* 231 U.S. 583, 585 (1913). Under California law, any issue as to which summary adjudication has been granted is conclusively established at the trial of the action. Cal. Civ. Proc. Code § 437c(f) (Deering Supp. 1988). Appellant could have sought review of the summary adjudication that he was limited to his special damages within ten days after service upon him of written notice of entry of the order (that is, on or before July 10, 1987). Cal. Civ. Proc. Code § 437c(*l*) (Deering Supp. 1988). Appellant did not do so.

Under California law, this requirement is jurisdictional; appellant's failure properly to seek pre-judgment review of the summary adjudication precluded the Court of Appeal from considering the merits of the trial court's ruling as to the Soldiers' Act. *Abadjian v. Superior Court,* 168 Cal.App.3d 363, 369-70, 214 Cal.Rptr. 234 (1985) (the substantive merit of issues summarily adjudicated by the trial court may not be reviewed by an appellate court prior to judgment unless the party affected by the summary adjudication filed a writ petition within the time limits set by California Code of Civil Procedure § 437c(*l*)). See also *Barth-Wittmore Insurance v. H.R. Murphy Enterprises, Inc.,* 169 Cal.App.3d 124, 136-37, 214 Cal.Rptr. 894 (1985) (compliance with the time requirement of section 437c(*l*) is mandatory if a party wishes to obtain pre-judgment review); *Sturm, Ruger & Co. v. Superior Court,* 164 Cal.App.3d 579, 581-82, 210 Cal.Rptr. 573 (1985) (the time limitation for seeking review by writ is jurisdictional).

In fact, in his initial opposition in the Court of Appeal to Times Mirror's writ petition, appellant did not even attempt to challenge the merits of the trial court's ruling

on the Soldiers' Act, claiming only that causation should be left to a jury. Appellant's First Opposition, at 14-22. Later, appellant did claim that the combination of applying section 48a and making a legal determination on causation violated his rights by denying him a jury trial. Appellant's Second Opposition, at 19-20. This claim — made only in opposition to Times Mirror's writ petition — was insufficient under California law to bring the merits of the trial court's ruling on section 48a before the Court of Appeal. *Abadjian,* 168 Cal.App.3d at 369-70 (appellate court may not review the merits of trial court summary adjudication except when a timely writ petition is filed even though the party affected by the adjudication challenges it in opposition to another party's writ petition).

Appellant also could have sought review of the trial court's decision by appealing the final judgment entered by the trial court on August 26, 1988. Cal. Civ. Proc. Code § 904.1, § 904.4 (Deering Supp. 1988 and 1988 Cal. Adv. Legis. Serv. 789). No appeal was taken in the California courts, and the time for taking such an appeal has expired. Cal. R. Ct. 2.

Because appellant never sought review by writ or appeal of the trial court's decision that section 48a applied to him regardless of the Soldiers' Act, the Court of Appeal never had that issue before it, and it never decided any such issue. Appellant's Appendix, at i. Therefore, that decision is not subject to review in this Court.

Appellant also claimed in the trial court that limiting him to his special damages would be "unfair and unconstitutional." PA 582-86. Despite appellant's constitutional claims, the trial court found that section 48a limited appellant to his special damages as to Times Mirror's first three articles. PA 9. Appellant never sought review by writ or appeal of this decision by the trial court. For the reasons just stated, this issue was not properly

raised in the Court of Appeal nor was it decided by that court. Therefore, this Court has no jurisdiction to review appellant's claims as to section 48a.

B. In Any Event, Appellant's Claims About Section 48a Would Not Constitute Grounds For An Appeal.

Jurisdiction by appeal exists only when (1) the judgment sought to be reviewed came in a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States" and (2) the judgment reflected a "decision in favor of . . . validity" of the challenged statute. 28 U.S.C. § 1257(2) (West 1966 and West Supp. 1988).

As to the first condition, "[i]t is essential to . . . jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 562 n.4 (1980) (quoting *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945)). As this Court explained in *Richmond Newspapers*, appellants there had never explicitly challenged the state statute's validity, but instead had argued that their constitutional rights prevented the state court from closing a trial pursuant to a Virginia statute. "Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court." 448 U.S. at 562 n.4.

Such claims, that a state's actions have deprived an individual of his rights under federal statutes or the federal constitution, are claims that may be presented to

this Court only by certiorari, not by appeal. See, *e.g.*, *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629-30 (1960) (an attack on the grounds that a tax assessment infringes the taxpayer's federal rights is not grounds for an appeal); *Kulko v. Superior Court of California*, 436 U.S. 84, 90 n.4 (1978) (argument that due process rights preclude state court from exercising jurisdiction is not grounds for appeal); compare *McCarty v. McCarty*, 453 U.S. 210, 219 n.12 (1981) (jurisdiction by appeal is proper when the appellant explicitly claimed that a state statute was preempted by federal law).

Appellant's first claim in this Court is that, by limiting him to his special damages, the California courts have deprived him of the protection afforded him by the Soldiers' Act. Jurisdictional Statement, at 34. This argument is a claim that appellant's federal rights have been infringed, and therefore is not grounds for an appeal. *Rohr*, 362 U.S. at 629-30.

Appellant next contends that, by limiting him to his special damages, the California courts have deprived him of some undefined constitutional right which he apparently believes *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) has enunciated for private figure defamation plaintiffs. Jurisdictional Statement, at 35-36. This argument amounts to a claim that appellant's constitutional rights have been violated, and therefore is not grounds for an appeal. *Richmond Newspapers*, 448 U.S. at 562 n.4.

Finally, appellant contends that, by limiting him to his special damages and determining as a matter of law that Times Mirror did not cause those damages, the California courts have unconstitutionally denied him the right to a jury trial on general damages. Jurisdictional Statement, at 37-41. This argument apparently is a claim that appellant's federal constitutional right to a jury trial has been

violated, and therefore is not grounds for an appeal. *Richmond Newspapers*, 448 U.S. at 562 n.4.

Thus, even if appellant's claims about California Civil Code § 48a had been properly raised and even if they had been decided by the California Court of Appeal, they would not sustain an appeal because there was no decision implicitly or explicitly upholding the validity of a state statute in the face of a proper federal challenge. On this basis alone, the appeal should be dismissed.

C. As To California Civil Code § 47(4), Appellant Raised No Federal Questions Below About Application Of California's Statutory Fair And True Report Privilege; Review Of The Court Of Appeal Decision Is Therefore Not Within The Jurisdiction Of This Court.

Appellant implicitly concedes that the only California statute whose validity he even attempted to challenge below on federal grounds was the California correction statute, Civil Code § 48a. Jurisdictional Statement, at 3-4. He has not even asserted appellate jurisdiction to review the Court of Appeal decision as to California Civil Code § 47(4). Cal. Civ. Code § 47(4) (Deering Supp. 1988).

Nonetheless, appellant now contends in this Court that application of the statutory fair and true report privilege to him was unconstitutional. His apparent claim is that, because of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), he has some federal constitutional protection because he is a private figure.[9] Jurisdictional Statement, at 43-45.

---

[9]The privilege afforded by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was not asserted by Times Mirror in this proceeding. Appellant's status as a public or private figure was therefore irrelevant to the motion before the California courts. Nevertheless, it is clear that as the commander of a Navy vessel, appellant would be a

In the Court of Appeal, appellant treated the application of the statutory fair and true report privilege solely as a question of state law. Appellant's First Opposition, at 26-34; Appellant's Second Opposition, at 20-25. As appellant recognized below, the Court of Appeal decision that California Civil Code § 47(4) protected Times Mirror's articles about appellant's court-martial was based on its interpretation and application of the California statutory privilege. Appellant's Petition, at 13-26.

There is no jurisdiction to review this state law determination by the Court of Appeal even if this Court decides that the papers on appeal should be regarded as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103 (West 1982). The essential element to this Court's jurisdiction, either by certiorari or by appeal, is that a substantial federal question has been properly raised in the state court. No federal question as to the application of California Civil Code § 47(4) was ever raised in the Court of Appeal, so this Court has no jurisdiction to review the Court of Appeal decision as to section 47(4).

In addition, appellant has not even attempted to meet the standards for certiorari. Besides the need for raising a substantial federal question, appellant must show that the decision below conflicts with the decision of another state court or a federal court of appeals, or he must demonstrate an important but unsettled question of federal law or a federal law determination that conflicts with decisions of this Court. Sup. Ct. R. 17. There is no such showing, nor even an attempt to make such a showing, here.

---

public official for purposes of the *New York Times* privilege. *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 805 (9th Cir. 1978).

D. Review Of The Court Of Appeal Decision On Causation Is Not Within The Jurisdiction Of This Court Because No Federal Questions About Causation Were Raised Below.

Although appellant has acknowledged implicitly that he raised no causation issues that would create appellate jurisdiction (Jurisdictional Statement, at 3-4), he nonetheless contends that the California courts unconstitutionally expanded the neutral reportage doctrine "by implication" by denying him a jury trial on the issue of causation. Jurisdictional Statement, at 42. In addition to his failure to make this claim in any California court, appellant does not specify what action by the California courts was unconstitutional, what constitutional provision was violated, nor even what constitution — state or federal — was violated.

The "neutral reportage doctrine" was not the basis for the Court of Appeal decision on any point. Appellant's Appendix, at i. Times Mirror never relied on the neutral reportage doctrine below. Instead, the Court of Appeal decision on causation was based solely on state law, as appellant recognized in his Petition for Review to the Supreme Court of California. Appellant's Petition, at 4-9. Therefore, there is no jurisdiction to review the Court of Appeal's state law determination as to causation.

II.

APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE THE SOLDIERS' ACT HAS NO APPLICATION TO CALIFORNIA'S CORRECTION STATUTE

As pointed out in Section I(A), appellant never properly sought review of the trial court's determination that

the Soldiers' Act did not preclude application of California's correction statute to him. Therefore, he cannot bring that issue before this Court. Even if he could, an examination of the Soldiers' Act shows that it does not relieve appellant from complying with section 48a.

In his pleadings in the trial court, appellant first conceded that he had made no timely demand for correction of Times Mirror's first three articles as required by California Civil Code § 48a. PA 603. That section requires that a correction be demanded within twenty days of a plaintiff's knowledge of an alleged defamation. Cal. Civ. Code § 48a (Deering 1971). If no correction is demanded, the plaintiff is limited to his special damages. *Id.* After filing his first opposition to Times Mirror's summary judgment motion, appellant, citing the Soldiers' Act, sent Times Mirror a letter requesting correction of allegedly libelous statements in the first two articles. PA 319-20, 333. This letter came two and one-half years after the articles were published. *Id.* The trial court correctly found that the Soldiers' Act did not relieve appellant from complying with section 48a, that appellant had not made a timely correction, and that appellant was therefore limited to his special damages. PA 9, 25-29. The trial court's decision was correct.

Appellant now apparently relies on section 510 of the Soldiers' Act. That section sets forth the purpose of the Act: "to suspend enforcement of civil liabilities, *in certain cases* . . . " and to establish *"the following provisions* . . . for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in [military] service . . . . " 50 U.S.C.A. App. § 510 (West 1981) (emphasis added). This section provides no relief *beyond that specifically set forth in the remainder of the Act. Arkless v. Kilstein,* 61 F.Supp. 886, 888 (E.D. Pa. 1944) (since the Act makes careful provi-

sions for instances where Congress thought a serviceman's civil rights should be protected, the courts should not indulge in judicial legislation by expanding the Act beyond its terms).

Besides section 510, the only other provision of the Act which appellant cites (Jurisdictional Statement, at 5-7) is section 525. By its own terms, this section does not apply to statutes such as California Civil Code § 48a. Section 525 provides that:

> STATUTES OF LIMITATIONS AS AFFECTED BY PERIOD OF SERVICE
>
> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation or order *for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government* by or against any person in military service .... nor shall any part of such period which occurs after the date of enactment ... be included in computing any period now or hereafter provided by any law for the redemption of real property ....

50 U.S.C.A. App. § 525 (West 1981) (emphasis added). The language of this provision makes clear that it applies only to statutes setting a time limit for (1) bringing any cause of action or proceeding in any court or government agency or (2) the redemption of real property.

Unlike the statutes affected by section 525, California's correction statute does not limit the period in which appellant could have brought this or any other action, and it is not therefore a statute of limitations. See, *e.g.*, *People v. Kings County Development Co.*, 48 Cal.App. 72, 74-75, 191 P. 1004 (1920) (statutes which merely restrict a right are not statutes of limitations; only those statutes which provide that no action shall be brought unless brought

within a certain time are statutes of limitations). Section 48a also is not a statute of limitations because it does not bar appellant's causes of action. See, *e.g., Seid Pak Sing v. Barker*, 122 Cal.App. 93, 100, 10 P.2d 92 (1932) (defense that statute of limitations has run is a complete bar). Since Congress was specific about the only two instances in which section 525 applies, it cannot be expanded beyond its terms. *Arkless*, 61 F.Supp. at 888. Therefore, since section 48a is not a statute of limitations, it is not affected by the Soldiers' Act.

Not only is this conclusion supported by the plain language of section 525, it also is supported by the case law interpreting the Act. See, *e.g., Newman v. Newman*, 234 Ga. 297, 216 S.E.2d 79 (1975) (section 525 does not toll state statute that provides for automatic reverter of land title); *Smith v. Pettijohn*, 366 P.2d 633 (Okla. 1961) (section 525 does not toll period for acquisition of land title by prescription); *Rebar v. Rebar*, 165 Pa. Super. 341, 67 A.2d 598 (1949) (section 525 does not toll period of desertion necessary for right to divorce); *Thornley v. Superior Court*, 89 Cal.App.2d 662, 663-64, 201 P.2d 567 (1949) (section 525 does not toll three-year period of California Civil Procedure Code § 581a for serving summons, because section 525 does not toll time periods for procedural steps taken in prosecution of an action but only tolls those which limit the time for bringing any action or proceeding); *Schroeder v. Toedtemeier*, 184 Or. 561, 200 P.2d 606 (1948) (section 525 does not extend time set in contract reserving right to remove timber from land).

Finally, the purpose of the Act was to prevent prejudice to the legal rights of servicemen who were absent because they were on duty. *Keefe v. Spangenberg*, 533 F.Supp. 49, 50 (W.D. Okla. 1981). The main concern of the Act, prejudice to servicemen serving in far off places, is al-

ready accommodated by section 48a, which requires that a correction demand be served within twenty days *after knowledge* of the publication. Cal. Civ. Code § 48a (Deering 1971). Here, appellant knew about the publication the day after it occurred so the purpose of the Soldiers' Act would not be served by applying it to this case. PA 72.

Section 525 has consistently been limited to its explicit terms, and appellant has cited no conflict that would justify this Court's exercise of jurisdiction even if he had properly raised this issue in the California courts. There also is no basis, even should this Court reach the merits, for determining that the Soldiers' Act precludes application of California's correction statute.

III.

APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE CALIFORNIA'S CORRECTION STATUTE IS CONSTITUTIONAL

Even if appellant had properly raised federal constitutional challenges to California's correction statute in the Court of Appeal, that statute is constitutional. The California Supreme Court dealt with claims similar to those advanced by appellant and upheld the constitutionality of California Civil Code § 48a in *Werner v. Southern California Associated Newspapers,* 35 Cal.2d 121, 216 P.2d 825 (1950), *appeal dismissed,* 340 U.S. 910 (1951).

In upholding the correction statute's constitutionality, the California Supreme Court concluded that:

> There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the

> danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news.

35 Cal.2d at 126.

The California Supreme Court continued:

> . . . we cannot say that the Legislature could not reasonably conclude that the danger of excessive recoveries of general damages in libel actions justified limitation of recovery to special damages when a retraction has not been demanded and refused.
>
> Nor can we take exception to the second basis upon which the Legislature could justify its limitation of recovery to special damages, namely, the public interest in the free dissemination of news. In view of the complex and far-flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain. The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation . . .

Id. at 128.

In addition to ruling on claims identical to the due process and equal protection claims which appellant apparently wishes to advance, the California Supreme Court

specifically rejected the argument that malice by the publisher affects the application of section 48a:

> Section 48a may also be sustained under the equal protection clause on the theory that its purpose is to encourage the dissemination of news. Although it extends its protection to those who may *deliberately and maliciously disseminate libels*, the Legislature could reasonably conclude that it was necessary to go so far effectively to protect those who in good faith and without malice inadvertently publish defamatory statements.

Id. at 134 (emphasis added). Appellant cannot and does not cite a single case suggesting that *Werner* is not sound, that California Civil Code § 48a is unconstitutional, or that there is any conflict on this point.

Instead, appellant's arguments in this Court about the correction statute involve interpretation of state — not federal — law. For example, appellant focuses on (1) the interaction between California's statute on libel *per se* and the California correction statute; (2) what the California legislature intended when it enacted section 48a; and (3) whether section 48a applies to "hot news." Jurisdictional Statement, at 37. Appellant's only alleged federal question as to the correction statute appears to be that a private figure libel plaintiff cannot constitutionally be required to prove special damages. Jurisdictional Statement, at 40-41.[10]

---

[10]In the trial court, appellant asserted only that limiting him to his special damages would be "unfair and unconstitutional." PA 582-86. He never even specified what provision of the federal constitution, if any, would be violated by limiting him to his special damages. Although unclear, appellant appears to claim that he has a constitutional right of privacy and a constitutional right to a jury trial, and that these rights were infringed by the Court of Appeal ordering summary judgment for Times Mirror. See, *e.g.*, Jurisdictional State-

There are several problems with this argument. First, appellant has failed to even allege that any specific provision of the federal constitution protects private figure libel plaintiffs. Instead, appellant apparently believes that requiring him to prove special damages is unconstitutional because of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Jurisdictional Statement, at 35-36. *Gertz* recognized no federal constitutional protection for libel plaintiffs; it set a federal constitutional minimum on the degree of fault a private figure plaintiff is required to prove in certain defamation actions and the kind of damages that may be recovered in those actions. *Gertz* pertains to what the federal constitution requires, not to the very different question of what the federal constitution allows. The federal constitution certainly limits what remedies a state may give to a defamation plaintiff, but it does not prevent a state from enacting a statute that is more protective of free speech than is the federal constitution.

The trial court correctly determined that the federal constitution did not forbid California from adopting a correction statute that limits plaintiffs who fail to make a correction demand to their special damages. Even if this Court reaches the merits, this determination should be upheld.

---

ment, at 35-43. As to the first claim, the right appellant asserts in this lawsuit is the right to reputation, which is not protected by the federal constitution. *Paul v. Davis*, 424 U.S. 693, 712-713 (1976) (interest in reputation is not a right which is protected by the federal constitution; moreover, the federal constitutional right of privacy does not encompass a claim that a state may not publicize a record of an official act). As to the second claim, this Court has long held that summary judgment does not infringe the federal constitutional right to trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902).

CONCLUSION

For the reasons stated, appellant failed to properly raise in the Court of Appeal any substantial federal questions or federal challenges to the validity of any California statute. The Court of Appeal decision is based solely on state law. Review of that decision is therefore not within this Court's jurisdiction.

Dated: February 17, 1989

Respectfully submitted,

Of Counsel:
LINDA L. BERGER
GIBSON, DUNN & CRUTCHER
600 "B" Street,
Suite 2300
San Diego, CA 92101
(619) 531-7000

*REX S. HEINKE
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

WILLIAM A. NIESE
JEFFREY S. KLEIN
THE TIMES MIRROR COMPANY
220 WEST FIRST STREET
LOS ANGELES, CA 90053
(213) 237-3952

Attorneys for Appellee
**Counsel of Record*

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California, 90017.

On February 17, 1989, I served the within Motion to Dismiss in re: "Willard G. Chrisman v. The Times Mirror Company" in the United States Supreme Court, October Term 1988, No. 88-844;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Alexandra M. Kwoka, Esq.
Counsel of Record for Appellant
Coppo & Cosgrove
12520 High Bluff Drive, Suite 370
San Diego, California 92130

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on February 17, 1989, at Los Angeles, California.

CE CE MEDINA

No.88-844

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLARD G. CHRISMAN
Appellant

v.

THE TIMES MIRROR COMPANY
Appellee

On Appeal From The California Court of Appeal, Fourth Appellate District Division One

APPELLANT'S REPLY BRIEF

Alexandra M. Kwoka
Carlo Coppo
COPPO & COSGROVE
11975 El Camino Real
Suite 303
San Diego, California 92130
(619) 481-2392

Attorneys for
Appellant

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
I. THIS APPEAL IS WITHIN THIS COURT'S APPELLATE JURISDICTION	5
A. Appellant Challenged the Constitutionality of the California Retraction Statute.	5
B. Appellant Presented and Preserved the Federal Question as to the Constitutionality of the Literary License Doctrine as Applied in the Present Case.	11
THIS CASE RAISES SUBSTANTIAL FEDERAL QUESTIONS WHICH WARRANT THE EXERCISE OF THIS COURT'S CERTIORARI	12
CONCLUSION	14
FOOTNOTES	16

TABLE OF AUTHORITIES

Federal

	Page(s)
Bickford v. United States 656 F.2d 636 (Ct. of Claims 1981)	17
Calder v. Jones 465 U.S. 783 (1984)	14
Cox Broadcasting Corp. v. Cohen 420 U.S. 469 (1975)	10
Dorr v. United States 195 U.S. 138 (1903)	12
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 105 S.Ct. 2939 (1985)	14
First English Evan. Luth. Church v. Los Angeles County 107 S.Ct. 2378 (1987)	6
Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974)	13
Goldwater v. Ginzberg 414 F.2d 324 (2d Cir. 1969) cert.den. 396 U.S. 1049	20
John v. Paullin 231 U.S. 583 (1913)	8
Kulko v. Superior Court of California 436 U.S. 84 (1978)	9
Modern Industrial Bank v. Grossman 40 N.Y.S. 2d 628 (1943)	17

New York ex rel. v. Bryant
v. Zimmerman
278 U.S. 63 (1928) 18

New York Times Co. v.
Sullivan
376 U.S. 254 (1964) 12, 13, 19

Paul v. Davis
424 U.S. 693 (1976) 19

Philadelphia Newspapers, Inc.
v. Hepps
106 S.Ct. 1558 (1986) 10, 12

Pleshar v. United States
227 F.2d 624, 628 (9th Cir.
1985) affd. 352 U.S. 202 17

Pruneyard Shopping Center v.
Robins
447 U.S. 74 (1980) 6, 10

Richmond Newspapers, Inc.
v. Virginia
448 U.S. 555 (1980) 8, 18

Rohr Aircraft Corp. v.
County of San Diego
362 U.S. 628 (1960) 8

St. Amant v. Thompson
390 U.S. 727 (1968) 12, 16

Schiavone Const. Co. v.
Time, Inc.
735 F.2d 94 (2d Cir. 1984) 20

Staub v. City of Baxley
355 U.S. 313 (1958) 17

Street v. New York
394 U.S. 576 (1969) 7, 8, 16,
18

Super Tire Engineering Co. v. McCorkle
550 F.2d 903 (3d Cir. 1977) cert. den. 434 U.S. 827, rehrg. den. 434 U.S. 1025 — 19

Time, Inc. v. Firestone
424 U.S. 448 (1976) — 13

Westmoreland v. CBS, Inc.
596 F.Supp. 1170 (S.D.N.Y. 1984) — 20

California

Burnett v. National Enquirer
144 Cal.App.3d 991 (1983) app. den. 465 U.S. 1014 — 18

CODES/STATUTES

Reference	Section	Page No(s).
Civil Code	47(4)	Passim
	48a	Passim
28 U.S.C.	1257(2)	i
	1257(3)	ii
	2103	ii, 18

MISCELLANEOUS

Reference	Page No(s).
Soldiers & Sailors Civil Relief Act, 50 U.S.C. App. 501, et. seq.	i, 17

QUESTIONS PRESENTED

The questions presented by this reply to the motion to dismiss are:

1. Where the Appellant raised in the trial court, before the appellate court, and in the California Supreme Court the issue of the constitutionality of the retraction statute, the application of the Soldiers' & Sailors' Civil Relief Act, and the scope of the privileges to be accorded to the press, under California Civil Code § 47(4) and federa law, and where the California courts' implicity upheld the constitutionality of the California statutes, and expanded the scope of the press' privilege under the First Amendment, were the federal questions presented by this appeal adequately raised so that the matter is within this court's appellate jurisdiction under 28 U.S.C. § 1257(2)?

2. If this court determines that there is no jurisdiction by appeal, because appellant's arguments and the issues raised

before the California courts concern the unconstitutionality of a retraction statute, the application and scope of the neutral reportage and literary license doctrines, and the extent to which a person defamed by the press may be deprived of his right to protect his reputation where there is evidence that the press acted with actual malice, is this case appropriate for the exercise of this court's jurisdiction by writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

STATEMENT OF THE CASE

Appellant Willard G. Chrisman ("Chrisman") filed his libel action in May 1985. On July 25, 1986, appellee Times-Mirror Co., publisher of the L.A. Times ("the Times") moved for summary judgment. On October 20, 1986, Chrisman filed his Opposition, and in subsequent briefs, challenged the use of the retraction statute, the burden of proof imposed on him, and the scope of the privileges claimed by the Times, including on constitutional grounds.[1/]

On June 26, 1987, the trial court denied the Times' motion for summary judgment, finding that neither the California retraction statute, Civil Code §48a ("48a"), nor the privilege available to the press for neutral reporting on court proceedings set forth in California Civil Code §47(4) (47(4)a), nor federal constitutional law, warranted granting the Times' motion.

The Times sought review of the trial

court's ruling by petition for writ of mandamus. Chrisman opposed the petition, arguing that the trial court correctly ruled that whether the Times' conduct caused him injury and special damages, based on the record before it, presented factual questions for the jury; that as a matter of law the articles published concerning his court-martial trial were not privileged because they were not "fair and true" as required by § 47(4) and not privileged under federal law.[3/]

On September 27, 1987, the Court of Appeal denied the Times' petition. The Times then petitioned the California Supreme Court to review this decision. In his Answer to the petition, filed October 21, 1987, Chrisman contended (at pp. 25-29) that the Times' conduct was not absolutely privileged under the federal constitution. The Supreme Court directed the Court of Appeal to hear the matter on November 12, 1987. In his second response to the peti-

tion filed December 7, 1987 (at pp. 5, 7-11, 13-16, 19-25), Chrisman contended that § 48a was unconstitutional, and unconstitutional as applied because he was and is a private figure and there was evidence of actual malice; he also raised the constitutional issues as to whether or not applying § 47(4) to deprive him of a trial on the merits given the evidence of actual malice as to the defamatory allegations made in the Times' reports of his court-martial was constitutional.

On May 9, 1988, the Court of Appeal entered its opinion directing the trial court to enter summary judgment for the Times. The clear import of this decision, was to uphold §§48a and 47(4) and to expand the scope of the neutral reportage and literary license doctrines despite Chrisman's challenge that they were repugnant to the constitution.

On May 23, 1988, Chrisman filed his Petition for Rehearing in the Court of

Appeal.[3/] On June 17, 1988, Chrisman filed his Petition for Review in the California Supreme Court. He again claimed that the retraction statute was unconstitutional on its face and its application unconstitutional because it imposed an improper burden of proof upon him. He also asserted that the failure of the Times to truthfully and fairly report on the court-martial proceedings abrogated the 47(4) privilege. The Supreme Court denied the Petition.

In sum, the trial and appellate courts of California, Chrisman raised the constitutional issues he now requests this court consider and claimed that the statutes at issue herein, and their application under the circumstances, was unconstitutional.

SUMMARY OF ARGUMENT

Although the California Court of Appeal did not expressly address Chrisman's constitutional claims, the appellate court necessarily upheld the constitutionality of the retraction statute, §48a, and the priv-

ilege statute, 47(4), despite Chrisman's status as a private individual, the evidence of actual malice, and the qualified nature of the privilege accorded to the press when reporting on judicial proceedings. Appellate jurisdiction therefore exists.

Should this court conclude that there is no appellate jurisdiction, this court can and should conclude that it has certiorari jurisdiction because important constitutional questions concerning California's retraction statute, the privileges available to the press when its articles are not "hot news," where evidence of actual malice exists, and the scope of the neutral reportage and literary license doctrines have been raised, which are ripe for review.

I.

THIS APPEAL IS WITHIN THIS COURT'S APPELLATE JURISDICTION.

A. Appellant Challenged the Constitutionality of the California Retraction Statute.

The Times asserts that no substantial

federal questions or challenges to the validity of the retraction statute, §48a, were properly before the California courts. This is not so.[4/]

The trial court determined the retraction statute did not act as a bar to Chrisman's libel claims premised on those articles for which no retraction demand was made.[5/] Thereafter, before the Court of Appeal and the Supreme Court, Chrisman contended that "§48a, which limited him to special damages, was unconstitutional and denied him due process and equal protection where the accusations made were not "hot news," there was clear and convincing evidence of defendant's actual malice, defendants did not offer evidence to contest plaintiff's status as a private figure, and the accusations were libelous on their face." As in First English Evan. Luth. Church v. Los Angeles County 107 S.Ct. 2378 (1987) and Pruneyard Shopping Center v. Robins 447 U.S. 74 (1980), the California

Court of Appeal, by rejecting plaintiff's claim that he was entitled to have a jury determine whether his constitutional rights were violated (here, the issue was whether or not he was libeled by the publication of the May 20, 1984 article, which lead to his removal from command of his ship before the Navy reopened its investigation and instituted court-martial proceedings), made a final determination of the federal issue.

The Times nevertheless contends the arguments made by Chrisman throughout the lower court proceedings were insufficient to preserve the federal question stating: "California law is controlling on whether a federal question was properly preserved in the California courts," citing John v. Paullin 231 U.S. 583 (1913) (Appellee Brief, p. 8). The Times' contention is without merit. As this court recognized in Street v. New York 394 U.S. 576 (1969) at 583:

> The issue whether a federal question was sufficiently and properly raised in the state court is itself

ultimately a federal question, as to which this court is not bound by the decision of the state court.

As in Street v. New York, even though the California Court of Appeal did not mention the constitutionality of §48a, it is apparent that the unconstitutionality of §48a was necessarily decided when the Court of Appeal directed entry of summary judgment for the Times.[6]/

The Times, in support of this contention, which flies in the face of the Street decision cited above, cites several cases, none of which is controlling. [7]/ In Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980), this court noted that "appellant never explicitly challenged the statute's validity."[8]/ In the present case, Chrisman repeatedly challenged §48a's validity.

In Rohr Aircraft Corp. v. County of San Diego 362 U.S. 628 (1960), this court, relying on precedent, declined to exercise appellate jurisdiction: "an attack upon a

tax assessment or levy on the ground that it infringes a taxpayer's federal rights does not sustain an appeal." In the present case, there is no issue concerning a tax levy.

In Kulko v. Superior Court of California 436 U.S. 84 (1978), relying again on precedent (concerning its jurisdiction when of a state's in personam jurisdiction statute is at issue), this court declined to exercise appellate jurisdiction; it treated the papers as a petition for certiorari. This case patently does not and did not present a jurisdictional issue; rather the constitutionality of § 48a.[9/]

In sum, the cases appellee relies on are inapposite, whereas recent cases concerning the First Amendment, its scope, and the limitations is imposed upon the press, support a determination that, under the circumstances presented herein, where a state statute has been challenged as uncon-

stitutionally depriving appellant of rights guaranteed to him, the exercise of this court's appellate jurisdication is appropriate. See, Pruneyard Shopping Center v. Robbins, supra; Cox Broadcasting Corp. v. Cohn 420 U.S. 469 (1975); Philadelphia Newspapers, Inc. v. Hepps 106 S.Ct. 1558 (1986).

In a case argued before this case in January, Oring v. California State Bar (No. 87-1224), this court determined, in June 1988, that it had appellate jurisdication to determine the constitutionality of the California State Bar's presumption that testimonial advertising is inherently misleading and thus unethical. The presumption imposed a burden on the appellant which he contended was either unconstitutional or had been met. The present case presents a situation analogous to that before this court in Oring. The California statute at issue, 48a, limits a recognized constitutional right to recover for damages

to personal reputation and to business reputation. Whether the limitation is constitutional is an issue which was implicity determined by the Court of Appeal, and thus the constitutionality of § 48a is an issue appropriately determined by this court on appeal.

B. Appellant Presented and Preserved the Federal Question as to the Constitutionality of the Literary License Doctrine as Applied in the Present Case.

The Times, in its trial court and appellate briefs, contended that its reports on the court-martial were "absolutely privileged" under the "literary license doctrine" enunciated by the federal courts. Chrisman, at all times, admitted that the federal courts had recognized that a fair and true report of a judicial proceeding was a part of the First Amendment privilege accorded the press, but asserted that its application under the circumstances, where the reports on the court-martial were grossly distorted and biased and neither fair nor true, was improper.[10/]

The result of the appellate decision was the creation of absolute privilege where none exists, contrary to this court's repeated admonitions that a private individual's good name is to be protected. Philadelphia Newspapers, Inc. v. Hepps 106 S.Ct. 1558 (1986) dis. opn. by J. Stevens at p. 1566, and that repetition of a falsehood about a public official or figure does not release the press from responsibility if made with reckless disregard for the facts. St. Amant v. Thompson 390 U.S. 727, 732 (1968); New York Times Co. v. Sullivan 376 U.S. 254, 278 (1964). The press cannot repeat the accusations of others, whether or not made in judicial proceedings unless its reporting is "neutral," "impartial" and not misleading. Dorr v. United States 195 U.S. 138 (1903).

THIS CASE RAISES SUBSTANTIAL FEDERAL QUESTIONS WHICH WARRANT THE EXERCISE OF THIS COURT'S CERTIORARI

Chrisman contended that the courts

were required to determine whether or not he was a public figure.[11/] He also argued that there was clear and convincing evidence the Times, in republishing the unfounded accusations of Navy personnel without investigation, and repeating those allegations in its reports of the court-martial, and editing its presentation of the court-martial testimony so as to exclude any report on the testimony of defense witnesses and all testimony favorable to him by prosecution witnesses, acted with malice. The claims made by Chrisman were rejected by both the California Court of Appeal and Supreme Court not expressly, but by implication.[12/] The effect of the courts' rulings was to deprive Chrisman of a constitutional right, recognized by this court since it seminal cases: New York Times v. Sullivan, supra, Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974), and thereafter in Time, Inc. v. Firestone 424 U.S. 448 (1976), the right to the protec-

tion of his good name.[13/] The Court of Appeal, by premising its decision to grant the appellee's motion for summary judgment on the retraction statute and the privilege accorded a fair and true report of judicial proceedings, without consideration of the constitutional issues raised by its determination to employ these statutes to bar the presentation of Chrisman's libel claims to a jury, determined adversely to Chrisman the federal issues before it.[14/] As in Calder v. Jones 465 U.S. 783 (1984) and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 105 S.Ct. 2939 (1985), this court can and should find if appellate jurisdiction is absent, this case warrants issuance of a writ of certiorari.

CONCLUSION

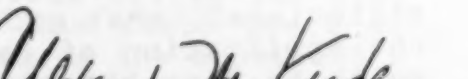
Although the Court of Appeal declined to expressly decide the federal issues Chrisman raised, it did so by implication, ruling in favor of the challenged statutes. It thereby deprived appellant of his con-

stitutional right to a jury trial, even where he presented clear and convincing evidence that if he was deemed a public official or public figure, the press acted with actual malice. The decision of the California Court of Appeal is in conflict with this court's precedent and the decisions of the federal courts. Accordingly, this court can and should exercise its appellate jurisdiction. Alternatively, Chrisman respectfully requests this court treat this appeal as a petition for writ of certiorari and grant the same.

Respectfully submitted,

Dated: March 2, 1989

COPPO & COSGROVE

By: 
Alexandra M. Kwoka
Carlo Coppo
Attorneys for Appellant
WILLARD G. CHRISMAN

AMK:gvb[3.9]

[1]To refute the contention of the Times that Chrisman failed to raise the constitutional issues before the trial, the appellate court, and the Supreme Court, Chrisman hereby lodges with this Reply copies of his Opposition to the motion for summary judgment (filed 10/20/86) and his Supplemental Opposition to defendant's motion for summary judgment along with his Supplemental Declaration regarding the Soldiers & Sailors Civil Relief Act; his Answer to petition for review (filed 10/21/87); and the Petition for Rehearing (filed 5/23/88), which were not described in the Times-Mirror's fn. 6 nor lodged with this court.

[2]In this brief before the Court of Appeal (pp. 35-37), Chrisman argued that his case differed from St. Amant v. Thomas 390 U.S. 727 (1968) in that the issue of malice was not addressed by the Times; he asserted that the Times' conduct was substantially more egregious than that of the defendant in St. Amant, and that the Times' reporting went beyond permissible "literary license" as that doctrine is enunciated by the federal courts.

[3]In this petition, he argued that on its face the retraction statute was unconstitutional, that under the circumstances, the application of the retraction statute so as to deny him a jury trial was violative of the equal protection and due process clauses of the Fourteenth Amendment, and that by calling the L.A. Times' gross distortions permissible editing the court improperly expanded the scope of the press' First Amendment privilege.

[4]In Street v. New York 394 U.S. 576, (1969), the appellant did not explicitly challenge the constitutionality of the statute before the trial court, but asserted deprivation of a fundamental right. This was held sufficient. Here, although Chris-

man did not challenge the constitutionality of the retraction statute in the trial court, he did assert deprivation of his fundamental right.

[5]The Times acknowledges that Chrisman asserted that the trial court should not grant the Times' motion for summary judgment because of his status as a member of the military and the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. App. 501 et seq., ("Soldiers Act"). Chrisman also raised at the appellate level his claim that he was entitled to protection under the Soldiers Act. The Times' argument, premised on a limited application of the Soldiers' Act finds no support in the record or case law. The statute is to be liberally construed in favor of soldiers and sailors, Pleshar v. United States 227 F.2d 624, 628 (9th Cir. 1955) affd. 352 U.S. 202 (1956) and its purpose is to suspend legal proceedings and "transactions relating thereto." Modern Industrial Bank v. Grossman 40 N.Y.S. 2d 628 (1943). A member of the armed services need not show that he was handicapped from asserting his claims (Bickford v. United States 656 F.2d 636 (Ct. of Claims 1981), although Chrisman did so.

[6]In Staub v. City of Baxley 355 U.S. 313 (1958), as here, the state Court of Appeal declined to pass on the appellant's contention that the statute at issue was unconstitutional. This court concluded it was within its province to inquire as to whether or not the appellant's federal right was "denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support." In the present case, the appellate court was presented with factual and legal grounds for concluding that §48a impermissibly limits the recovery of damages from the press, and under the circumstances imposed unwarranted burdens on

Chrisman and abridged rights guaranteed under the constitution. The court ignored issues which this court has previously held must be determined: (1) the status of an individual (private or public figure); and (2) evidence of actual malice, in ruling that summary judgment was mandated. In doing so, the court denied, in substance and effect, Chrisman's federal rights.

[7] In Street v. New York, supra, at pp. 584-585, citing New York ex rel. v. Bryant v. Zimmerman 278 U.S. 63, 67 (1928), this court noted there are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the constitution of the United States: "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

[8] In Richmond Newspapers, Inc. v. Virginia, this court, although it concluded that it did not have jurisdiction by appeal, determined to treat the matter as a petition for certiorari pursuant to 28 U.S.C. 2103, and granted the petition, apparently on the basis that the rights guaranteed under the First and Fourteenth Amendments were of paramount importance and the issues ought to be decided by the court.

[9] If this court rejects appellant's claim that it has appellate jurisdiction, in light of the admission by the Times' editor Dale Fetherling that the initial article was not "hot news," and the California courts' recognition that the retraction statute was not intended to protect

publishers where the publisher has an opportunity to investigate the story before publication. (Burnett v. National Enquirer 144 Cal.App.3d 991 (1983) app. dism. 465 U.S. 1014), appellant requests that this appeal be considered for writ of certiorari; the case presents an opportunity to decide an issue of importance to both the press and the public.

[10] See, for example, pp. 35-37 of Chrisman's Opposition to Petition for Writs of Mandamus, Prohibition & Review lodged with this court by appellee.

[11] In New York Times v. Sullivan, this court left open the question of "how far down" into the lower ranks of government employees the "public official" designation extends. 376 U.S. at 254, fn. 23.

[12] As the court recognized in Super Tire Engineering Co. v. McCorkle 550 F.2d 903 (3d Cir. 1977) cert. den. 434 U.S. 827, rehrg. den. 434 U.S. 1025, federal rights are denied not only by an erroneous decision concerning federal rights, but also by a refusal of the state court to explicitly determine the issue. Where a federal question is raised, and a state court decides the federal right by upholding state law, the state court by limiting its decision does not defeat federal review.

[13] The Times, relying on Paul v. Davis 424 U.S. 693 (1976) suggests that this court has not recognized a right to reputation. See, Brief, fn. 10, pp. 20-21. This footnote exemplifies why this court should conclude, if it does not have appellate jurisdiction, that it will treat this matter as a petition for certiorari and grant the same. This case presents several issues of importance, as has been discussed. But, fundamentally, the issue which has been briefed in the courts below, which is presented by this appeal, and which

merits consideration by this court, is the extent to which this court is willing to evicerate its prior rulings which establish an individual's right to protect his reputation, and which set the parameters and framework which govern the assertion and protection of this right by an individual who has been defamed by the press.

[14] Appellee's contention at p. 13, that the decision below does not conflict with the decisions of other state courts or federal courts of appeal, is erroneous. See, for example, Schiavone Const. Co. v. Time, Inc. 735 F.2d 94 (2d Cir. 1984); Goldwater v. Ginzberg 414 F.2d 324 (2d Cir. 1969) cert.den. 396 U.S. 1049; Westmoreland v. CBS, Inc. 596 F.Supp. 1170 (S.D.N.Y. 1984).